96-5369

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1995

No. _____

DANIEL GREENE,
Petitioner,

v.

STATE OF GEORGIA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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81 pp

QUESTIONS PRESENTED

1. Whether the procedure for review of the removal for cause of a veniremember under Wainwright v. Witt, 469 U.S. 412 (1985), should be clarified in response to state court abnegation of responsibility to provide meaningful review of the constitutionally protected right to an impartial jury as guaranteed by the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States?

2. Whether, in the sentencing phase of a capital murder trial in which the defendant is restrained by a hidden security device, the defendant's due process and Eighth Amendment rights to a fair and reliable determination of sentence are violated when the prosecutor informs the jury of the use of extraordinary security measures when there is no reason the jury should know about such a device?

3. Whether, a capital defendant's rights to apply for funds and to a reliable determination of sentence were violated when after his motion for funds for expert mental health assistance was denied, the prosecutor cross-examined him about that motion at the penalty phase, eliciting the defendant's opinion that he was not "crazy" or "mentally retarded," and misleadingly argued to the jury that the motion was made for the purpose of fabricating an insanity defense?

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OPINION BELOW

Petitioner, Daniel Greene, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Georgia in Greene v. State, 226 Ga. 436, 469 S.E.2d 129 (1996). (Attachment A). Rehearing was denied on March 29, 1996. (Attachment B).

JURISDICTION

The judgment of the Supreme Court of Georgia affirming Petitioner's conviction and sentence of death was entered on March 15, 1996. Greene v. State, 226 Ga. 436, 469 S.E.2d 129 (1996). (Attachment A). Rehearing was denied on March 29, 1996. The jurisdiction of this Court is invoked under 28 *U.S.C.* §1257(3) (1986), Petitioner having asserted below and intending here to assert deprivation of rights secured by the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Sixth Amendment to the United States Constitution, which provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury ...

the Eighth Amendment to the United States Constitution which in pertinent part protects against imposition of "cruel and unusual punishment," and the Fourteenth Amendment to the United States Constitution, which provides in pertinent part:

> No state shall ... deprive any person of life, liberty, or property without due process of law ...

STATEMENT OF THE CASE

Petitioner, Daniel Greene, seeks a writ of certiorari from this Court to the Supreme Court of Georgia to review the decision of that court affirming his conviction and sentence of death. Mr. Greene was convicted of murder of a customer, Bernard Walker, for which he received the death sentence; as well as armed robbery and aggravated assault against a store clerk. All three crimes took place in a small convenience store in Taylor County, Georgia, in the evening hours of September 27, 1991.

Mr. Greene was tried by a jury substantially purged of blackjurors. Of 78 original veniremembers, 25, or 32 percent were black, 51, or 65.4 percent, were white, and 2, or 2.6 percent were "other." The court excused twenty-four venirepersons for cause, sixteen of whom were black and eight of whom were white. Of the sixteen persons excused for cause on the state's motion, thirteen were black. In addition, the state removed six of nine remaining black veniremembers with peremptory strikes. As a result of the trial court's rulings on motions to challenge jurors for cause, the

jury was also impermissibly skewed in favor of a death sentence. Five jurors who all said that they could consider and impose either a death sentence or a life sentence depending on the facts and circumstances of the case were excused for cause on motions by the state. While some of these jurors said that, prior to knowing anything about the facts of the case, they would favor a life sentence or generally leaned toward a life sentence, they all testified that they would set aside their personal opinions and beliefs and would vote for the imposition of the death sentence if appropriate.

During trial, Petitioner wore a remote controlled electrical security devise under his clothing. During the penalty phase the prosecutor informed the jury that extraordinary security precautions had been taken. The prosecutor elicited hearsay testimony from the sheriff to the effect that an unnamed prisoner had told law enforcement authorities that Mr. Greene had indicated that if sentenced to death the sheriff would have to kill him in the court room. The prosecutor then elicited that, as a result of that information, law enforcement had taken security precautions previously unknown in this part of the world.

Prior to trial, counsel for Mr. Greene made an *ex parte* application for funds for a mental health evaluation to assist in exploring possible mitigating circumstances for the penalty phase. After objection from the state, the motion was denied. Nevertheless, when Mr. Greene testified at the penalty phase, the prosecutor cross-examined him about his mental health and argued to the

jury that as he stated that he was not mentally retarded or ill the application for funds was an attempt to fabricate an insanity defense.

HOW THE FEDERAL QUESTIONS WERE PRESENTED AND DECIDED BELOW

On direct appeal to the Supreme Court of Georgia, Petitioner asserted that the trial court had erred in excusing for cause five veniremembers under the standard established in Wainwright v. Witt, 469 U.S. 412 (1985); Witherspoon v. Illinois, 391 U.S. 510 (1968). In each instance, Petitioner had objected to the state's motion to excuse the five venirepersons for cause. Petitioner further asserted on direct appeal that the trial court erred in denying his motion to excuse for cause a prospective juror whose pro-death penalty views substantially impaired her ability to decide his case fairly. The Supreme Court of Georgia upheld the trial court's decisions with regard to the prospective jurors. Greene v. State, 226 Ga. 436, 469 S.E.2d 129 (1996).

On direct appeal, Petitioner argued that the admission of testimony elicited by the state from the sheriff regarding the hearsay statements about Mr. Greene's future dangerousness and the extraordinary security measures, was so prejudicial, unreliable, and improper that it denied him his constitutional right to a fair trial. However, a majority of the Supreme Court found no violation of Mr. Greene's constitutional rights, and in fact did not address any constitutional claims. The dissent concluded that the hearsay and evidence "was so inherently prejudicial that it might well have

determined the outcome of the sentencing phase." Greene, 469 S.E.2d at 146.

Petitioner made a pretrial *ex parte* application for funds for mental health assistance which was denied. The fact of that application and the denial were then used by the state against him at the penalty phase. On direct appeal to the Georgia Supreme Court, Petitioner contended that the prosecutor's conduct violated his rights to due process, equal protection, a fair trial, and a reliable sentencing determination under the United States Constitution and other applicable law. In rejecting this argument, the Georgia Supreme Court did not address any of these constitutional claims. It held only that, because "there was no issue as to Greene's mental illness or retardation and, when Greene testified in his own behalf, he conceded his sanity and lack of retardation, ... it was not error for the prosecutor to pursue the topic and to argue to the jury that mental illness or retardation was not an impediment to imposition of the death penalty." Greene v. State, 469 S.E.2d at 139.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT CERTIORARI TO CLARIFY THE STANDARD FOR REVIEW OF THE REMOVAL OF A VENIREMEMBER UNDER WAINWRIGHT V. WITT, 469 U.S. 412 (1985), AND PROVIDE GUIDANCE TO STATE COURTS ON THE PROPER LIMITS OF STRIKES FOR CAUSE ON THE BASIS OF JURORS' BELIEFS REGARDING THE DEATH PENALTY

Certiorari should be granted for this Court to clarify its decision in Wainwright v. Witt, 469 U.S. 412 (1985), which is being interpreted by some courts as leaving to the complete discretion of trial judges whether to allow the removal for cause of jurors who

express scruples against death or preferences for life. A capital defendant's right to an impartial jury is violated by the states' current interpretation of the Witt standard. That interpretation has, in effect, allowed state appellate courts to turn a blind eye to trial courts' failures to protect a capital defendant from the prosecution's attempt to skew the jury in favor of death by challenging for cause jurors who express leanings toward life or hold scruples against the death penalty, but who can put those views aside and fairly and impartially consider both sentences. State courts, including the Georgia Supreme Court in this case, are divided over the application of the Witt standard, and need further guidance from this Court to prevent the promises of Witherspoon v. Illinois, 391 U.S. 510 (1968), and Wainwright v. Witt, 469 U.S. 412 (1985), of an impartial jury in a capital case from being broken.

A. State Courts Have Misapplied the Standard for Removal of Jurors Articulated in Witt

State Supreme Courts have read very broadly the standard articulated in Witt leaving trial determinations of juror qualification almost unreviewed, and undermining the constitutional mandate elaborated to protect the rights of the capitally accused to a fair trial and the duty of citizens to serve as jurors and represent the conscience of their communities.

When Juror Oden was questioned, she stated repeatedly and unequivocally that if, upon considering the evidence, she found the death penalty to be the appropriate punishment, she would vote for

death.[1] Although, in response to questioning from the prosecution, she expressed difficulty with "casually setting aside" her religious convictions regarding the death penalty,[2] she said she would be able to make a decision for death or life.[3] Nevertheless, the judge granted the prosecution's motion for cause.[4] This juror unambiguously fell into the category of prospective jurors who

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1. "THE COURT: If after hearing all the evidence in the case and listening to the charge of the Court you determine the most appropriate and proper sentence in the case was death by electrocution, would you vote for the death sentence?
JUROR ODEN: Yes, sir." (V.D. at 1251).

"MR. WELLS [Counsel for Defendant]: ... if you felt like after hearing all the facts from both the State and the defense, and after the Judge gives you the law, if you felt like that the appropriate sentence in this case was the death penalty, then that's what you would vote for, isn't it, Ms. Oden?
JUROR ODEN: Yes." (V.D. at 1260).

2. "MR. PULLEN [Prosecutor]: Is this feeling that you have something that you can just casually cast aside like a prejudice against stealing or against adultery or that kind of thing or is this something that no matter how you try, it's going to be a part of you because it is a part of you?
JUROR ODEN: I don't think you can just casually cast aside what's going to happen to someone's life.
MR. PULLEN: No, I'm asking about your attitude. Can you just disregard those -- that part of you that says that the death penalty is wrong? Can you just throw that away and forget about it or is that something that you are going to bring into the Courtroom, the jury box, and to the jury room?
JUROR ODEN: Yes, it's going to come with me. I just can't casually cast it aside." (V.D. at 1268, 1269).

3. "MR. PULLEN: ... at this point right now, do you have a preference as to what penalty based on anything other than the facts and the evidence in this case? And specifically your religious beliefs?
JUROR ODEN: I still contend I have problems with the death penalty. I think I am open-minded enough to accept the evidence from both sides and make a decision whether it be life imprisonment or whether it be execution." (V.D. at 1266).

4. (V.D. 1272, 1274, 1277, 1278).

"though opposed to capital punishment, will nevertheless conscientiously apply the law to the facts adduced at trial," Wainwright v. Witt, 469 U.S. at 421, yet the Georgia Supreme Court affirmed the trial court's rulings regarding this juror and four others who stated that they could follow the law and consider both sentences of life and death.

The reasoning of the Georgia Supreme Court conflicts with the underlying principles of this Court's decisions in Witt and Witherspoon, and abandons the appellate court's duty to provide substantive review of any excusal for cause under Witt. The Georgia Supreme Court correctly articulated the relevant question, "whether the trial court's finding that the proper standard ... was met ... is 'fairly supported' by the record 'considered as a whole,'" Greene v. State, 226 Ga. 436, 469 S.E.2d 129 (1996) (citing Witt, 469 U.S. at 433), and yet, without any specific review of the answers given in five separate sets of voir dire, came to its conclusion:

> [A]pplying this controlling authority here, it is clear that, whatever ambiguity may exist in the record of the voir dire, "the trial court, aided as it undoubtedly was by its assessment of [the prospective jurors'] demeanor[s], was entitled to resolve it in favor of the State." Wainwright v. Witt, supra at 434(IV).

Greene v. State, 469 S.E.2d at 135.[5] The court reviewed the trial court's decisions exclusively as findings of fact. Under the guise

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5. The dissent in Greene, on the other hand, extensively reviewed the testimony of four of the five disputed veniremembers, finding that the trial court erred in excluding all four of them, in conflict with Georgia Supreme Court and this Court's precedent. Greene v. State, 469 S.E.2d at 142-45.

of Witt's language eliminating the requirement of "unmistakable clarity" in proving juror bias, the Georgia Supreme Court affirmed the removal of jurors by a standard of review allowing trial courts to remove jurors on any ambiguity whatsoever regarding their bias.

In Witherspoon v. Illinois, 391 U.S. 510 (1968), this Court found the exclusion of veniremembers for cause on the basis of scruples against the death penalty to be in violation of the Sixth and Fourteenth Amendments of the U.S. Constitution:

> a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction.

Id. at 522. In Witt, which was decided on federal habeas corpus review, the standard for determining a juror's qualification under Witherspoon was modified, at least in part in response to the new death penalty statutes held constitutional in Gregg v. Georgia, 428 U.S. 227 (1976):

> a juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.

469 U.S. at 420 (citing Adams v. Texas, 448 U.S. 38, 49 (1980)). Under Witt, courts are not limited to removing those jurors who would automatically vote against death, and "unmistakable clarity" is no longer necessary in finding juror bias. 469 U.S. at 424. Although Witt reduced the standard of proof required for excluding a juror for cause, it did not abandon the promise of Witherspoon, that the state is constitutionally forbidden to use its challenges

for cause to "[produce] a jury uncommonly willing to condemn a man to die." 391 U.S. at 521.

The Court placed primary responsibility on trial courts to determine which jurors with scruples against death could and which could not impartially judge the evidence and apply the law. 469 U.S. at 429, 430. "In exercising its discretion, the trial court must be zealous to protect the rights of an accused." Id. at 430. Witt established the standard for habeas review by federal courts of the decisions of the trial court as a highly deferential one: whether the trial court's ruling on bias can be "fairly supported" by the record "considered as a whole." 469 U.S. at 433. This highly deferential standard applies in general to federal habeas corpus reviews of state court fact findings. Although the standard of review on appeal is a question of state law, state courts appear to be confusing the deferential federal habeas corpus standard with the legal analysis necessary under Witt. Whenever a trial court fails to zealously protect the rights of the accused, it is the reviewing court's duty to reverse and remand for a new trial. Gray v. Mississippi, 481 U.S. 648 (1987) (citing Davis v. Georgia, 429 U.S. 122 (1976) (per curiam)).

The Georgia Supreme Court confused the application of this standard and thereby failed to provide meaningful review of determinations implicating the constitutional protection of an impartial jury. Substituting form for substance, the Georgia Court relied on the trial court's "exhaustive and conscientious effort" during voir dire to search out bias, without reviewing any of the

prospective veniremembers' responses. Greene, 469 S.E.2d at 134. The court did not distinguish between questions of fact and law in its review of the trial court's decision-making process. In spite of the fact that four of these veniremembers "unambiguously indicated on voir dire that they could vote to impose a death sentence in an appropriate case," Id. at 142 (Benham, C.J., dissenting), the Georgia Supreme Court failed explain how Mr. Greene's case was distinguishable from Georgia state precedent on point. See id. at 142 (citing Jarrel v. State, 261 Ga. 880, 413 S.E.2d 710 (1992) (trial court's excusal of juror for having leanings toward life constitutes reversible error)). This inconsistency with prior precedent is further indication of the need to clarify the Witt standard. Citing the language of Witt, the Georgia Supreme Court allowed impartial jurors to be removed, and failed to protect Mr. Greene from a jury that "fell woefully short of that impartiality to which the petitioner was entitled under the Sixth and Fourteenth Amendments." Witherspoon, 391 U.S. at 518 (citing Glasser v. United States, 315 U.S. 60, 471-472; Irvin v. Dowd, 366 U.S. 717, 722-723; Turner v. Louisiana, 379 U.S. 466, 471-473).

In direct contradiction of the Witherspoon-Witt guarantee, the trial court granted motions for cause against jurors who expressed "leanings" against death, or who stated that they would think seriously before voting for death. A review of the record reveals that, contrary to the Georgia Supreme Court's acknowledgment that a prospective juror's responses cannot be "considered in isola-

tion," Greene, 469 S.E.2d at 134, the trial judge repeatedly relied on the last statement a veniremember made[6] or misstated an answer, in argument with counsel over a motion for cause.[7] The judge allowed questions from the prosecutor regarding whether the juror would want somebody with her views on a jury if her child had been murdered, which obviously is not the correct standard of juror qualification; the court then relied on jurors' answers to these

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6. "MR. WELLS: According to what Mr. Pullen just said, he said that he thought that the lady answered honestly. He also, when Mr. Pullen, he was commenting on the way I was asking the questions, Mr. Pullen asked the question, now, could you just casually cast off your religious beliefs. That's not what is required, Judge. She said that she could set them aside and give a fair consideration.
THE COURT: That wasn't - the last thing she said, she said she could not, she would take them to the jury room with her.
MR. WELLS: Yes, sir.
THE COURT: That's my recollection of what she said.
MR. WELLS: She said that she would have her religious beliefs with her. We can't ask someone to just - and Mr. Pullen used the word -
THE COURT: We -
MR. WELLS: - casually cast off.
THE COURT: We ask them to set them aside all the time, and she in effect, said she couldn't.
MR. WELLS: No, sir, she said she could set them aside when you asked her that question.
THE COURT: The last time she answered the question." (V.D. at 1277, 1278).

7. "THE COURT: Didn't she answer my first question, no she couldn't? Then, she changed it and said she could. The best she ever came to it was she said she would try, as I recall.
MR. WELLS: If it please the Court, she said she could do it.
THE COURT: She said she would try.
MR. WELLS: No, sir, the record -
THE COURT: The last thing she said, she said she would try.
MR. WELLS: I think the record would reflect that during your questioning and during Mr. Pullen's questioning at different times she said yes, she could do it." (V.D. at 1238).

questions in determining their ability to serve.[8] The judge also relied on a veniremember becoming emotional or pausing often, during an inquiry which one juror described as being "on trial,"[9] to discredit the juror's clear statements that she could vote for death. Such action explicitly contravenes this Court's declaration that it is impermissible to excuse for cause prospective jurors solely on the basis that they "would be more emotionally involved or would view their task with greater seriousness and gravity." Witt, 469 U.S. at 420 (citing Adams, 448 U.S. at 39). As the dissent in Greene pointed out, "[t]he majority's deference to the trial court's imagined findings regarding demeanor and credibility, under these facts, seriously undermines this court's ability ever to review any excusal for cause under Wainwright v. Witt." Greene, 469 S.E.2d at 145.[10]

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8. "MR. PULLEN: ... If the person who had been murdered was your loved one, would you want somebody with your attitude as to the death penalty on the jury?

JUROR BADY: I can't help how my attitude is, you know, for it, but if it was my child, you know, I would have to see totally different all the way around, if it was my son.

MR. PULLEN: But you understand that everybody, the victim, the defendant, the victim's family and the State are all entitled to the same open-minded jury. Now, would you describe your attitude as being open-minded toward the death penalty like you would want if it was your loved one who had been murdered?

JUROR BADY: Well, if it was my loved one, like I said, I would see it different, and I guess my feelings altogether would be different, you know." (V.D. at 1382, 1383).

9. "MR. PULLEN: I get the feeling that you think we're badgering you, but it's very important -

JUROR BADY: I feel like I'm on trial, I really do." (V.D. 1386). See also (V.D. 1235, 1274).

10. The confusion of the lower court is also exemplified by its inconsistent application of Witt. A juror who stated that,

(continued...)

State Supreme Courts, citing Witt, have all but abandoned their duty to protect jurors from being removed on the basis of their scruples about death. A survey[11] of the five states with the largest death row populations[12], reveals that, in the ten-year period following the Court's decision in Witt, reviewing courts in these states rendered conclusive findings on the question of improper excusal of life-leaning jurors in 189 cases while finding improper excusal in only six cases. In opinions vacating death sentences where a trial court's decision to allow a veniremember's removal was deemed erroneous, the reviewing courts provide little or no explanation for their conclusions. The paucity of cases in which reviewing state courts in the five states surveyed vacated a sentence and remanded due to improper exclusion of prospective jurors based on alleged opposition to death implicates the need for inquiry into the application of the Witt standard; when coupled with evidence that the excusals upheld often involved

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10. (...continued)
contrary to the clear requirements of Georgia law, she would lay the burden of proving that death was not warranted on the defense was allowed to remain on the jury while jurors who expressed far weaker attitudes toward life were excluded. (V.D. 1643-1677). This Court has articulated the same standard for removing death-leaning as life-leaning veniremembers for cause. Morgan v. Illinois, 504 U.S. 719 (1992). The trial court's uneven application of the Witt standard is further proof of the need for certiorari.

11. A search on Westlaw was conducted from April 23-27, 1996, searching for cases that mentioned the party names "Wainwright" and "Witt" or "Witherspoon," selecting for cases that came down after 1/21/85, the date that Wainwright v. Witt was decided.

12. California, Texas, Florida, Pennsylvania, and Illinois. Source: NAACP Legal Defense & Educational Fund *Death Row U.S.A.* (Winter 1995).

venirepersons whose views did not reveal a predisposition to find against the death penalty in ignorance of the applicable law, the misapplication of the standard is strikingly evident.

The survey revealed that the Supreme Court of California, on automatic appeal, issued findings on a defendant's claim of improper excusal of prospective jurors on Witt grounds in a total of fifty-four cases in the 10-year period following Witt.[13] The court upheld excusals in every instance, including one in which a veniremember was excused for cause after indicating general opposition to death and responding affirmatively to the court's question as to whether he opposed it "in every instance." Nobody ever asked him whether he could apply the law if he concluded that, under the law, the death penalty was appropriate. People v. Sanders, 797 P.2d 561 (Cal. 1990), cert. denied, 500 U.S. 948 (1991). The reviewing court failed to heed the admonishment of the dissent that the prospective juror's answer to the trial court's question "add[ed] nothing, because a person who is against the death penalty is, by definition, opposed to it in every instance." Id. 797 P.2d at 608 (Broussard, J., dissenting).

As in California, reviewing state courts in Florida and Pennsylvania found no error in trial courts' decisions to excuse jurors for cause based on alleged anti-death bias. The Supreme Court of Florida considered claims of improper excusals in twenty-one cases[14]; appellate courts in Pennsylvania issued findings in

13. See Attachment C, Section A.

14. See Attachment C, Section C.

eleven cases.[15] Not a single instance of improper excusal was found in any of these cases. The excusals upheld include one in which the Supreme Court of Florida upheld the excusal for cause of a venireperson because he vacillated on the issue of whether he could impose the death penalty and "was clearly uncomfortable with the issue." Hannon v. State, 638 So.2d 39 (Fla. 1994), cert. denied, 115 S.Ct. 1118 (1995).

Reviewing state courts in Illinois considered claims of improper excusals of jurors for alleged inability to follow the death penalty law in seventeen cases.[16] In only one of these cases was a defendant's claim upheld. People v. Seuffer, 582 N.E.2d 71 (Ill. 1991). Cases in which excusals for cause were upheld include one in which the Court acknowledged that the challenged venireperson "said that his scruples against the death penalty would not interfere with his ability to determine guilt or innocence, and that he could consider all penalties, including the death penalty." People v. Williams, 641 N.E.2d 296 (Ill. 1994). The court, however, upheld the excusal of this venireperson, in violation of the Witt standard, because the juror "unequivocally stated three times that he was against the death penalty," id. at 319, and because, although he had not stated that he would automatically vote against death, "neither did he state that he would be willing to temporarily put aside his own beliefs in deference to

15. See Attachment C, Section D.

16. See Attachment C, Section E.

the law." Id. The reported voir dire reveals that the juror *was never asked* about his ability to put aside such views.

Although Texas appellate courts reviewed claims of Witt violations in excusal of veniremembers in eighty-six cases,[17] improper excusals were identified in only five instances.[18] Among the eighty-one cases in which trial courts' exclusions of veniremembers on Witt grounds was deemed proper was a case in which the prospective juror "was never asked whether her views might substantially interfere with her ability honestly to answer the special punishment questions prescribed by law." Fuller v. State, 829 S.W.2d 191, 200 (Tex.Cr.App. 1992), cert. denied, 508 U.S. 941 (1993). The Fuller court also expressly overruled the determination in its earlier decision in Hernandez (abuse of discretion where veniremember not questioned as to ability to apply law despite opposition to death penalty), thereby decreasing the instances of a finding of improper excusal during the 10-year post-Witt period from five to four.

B. Without Guidance from This Court, State Courts Will Continue to Fail to Provide Meaningful Review of Juror Excusals Under Witt, and the Constitutionality of the Death Penalty Structure is Undermined

17. See Attachment C, Section B.

18. Riley v. State, 889 S.W.2d 290 (Tex.Cr.App. 1993), cert. denied, 115 S.Ct. 2569 (1995); Wilson v. State, 863 S.W.2d 59 (Tex.Cr.App. 1993); Hernandez v. State, 757 S.W.2d 744 (Tex.Cr.App. 1988), cert. denied, 504 U.S. 974 (1992); Ex parte Williams, 748 S.W.2d 461 (Tex.Cr.App. 1988); Ex parte Hughes, 728 S.W.2d 372 (Tex.Cr.App. 1987), cert. denied, 115 S.Ct. 1967 (1995).

State courts need guidance from this Court to provide meaningful review of the death qualification process. In order to protect the rights of both jurors and defendants, this Court needs to provide guidelines to distinguish between questions of law, which require no deference, and questions of fact, which do require deference, in the review of trial court determinations of motions to remove jurors for cause under Witt. A review of the decisions of state appellate courts reveals the need for this Court to evaluate the current presumption that a trial judge has correctly applied the law when voir dire strongly indicates that the judge applied the law erroneously. Reviewing courts need guidance as to whether it is necessary under Witt that, before jurors can be excused due to their attitudes about the death penalty, they be asked questions which go to the ultimate issue of whether they can put aside their personal views and follow the law. By allowing courts to continue to strike jurors without serious inquiry into their ability to serve as jurors, the constitutional rights of both jurors and defendants are left unprotected.

While Witt provided guidance as to what is not required in determining juror bias, it left open the possibility that trial and appellate courts would take advantage of the deference given to the rulings of trial judges. It provided a ceiling, by informing courts as to what was too strict a standard, without providing a floor, delineating when a certain amount of deference was "enough." The result has been that "deference," Witt, 469 U.S. at 425, has evolved into automatic acceptance, thereby ensuring the demise of

meaningful review. State courts need guidance to determine which aspects of a trial court's decision-making deserve deference and which relate to matters of law and deserve no deference.

When state courts fail to protect a defendant's right to an impartial jury, the constitutionality of the death penalty is questioned. In McCleskey v. Kemp, 481 U.S. 279, 309 (1987), the Court relied on the role of the jury in our criminal justice system and the procedural protections in place to preserve impartiality, to reject a challenge to the Georgia death statute on the basis of racial discrimination. The Court invoked the importance of "the jury's task of 'express[ing] the conscience of the community on the ultimate question of life or death.'" Id. at 310 (citing Witherspoon, 391 U.S. at 519). When jurors who have shown their impartiality through voir dire are nonetheless removed for cause, the structure supporting the death penalty's constitutionality is shaken. Appellate courts must provide meaningful review of trial court determinations to protect the rights of citizens to participate in the process of criminal justice and serve their important role as representatives of the community.[19]

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19. When the trial court's determinations on motions for cause go unreviewed, the rights protected by Batson v. Kentucky, 476 U.S. 79 (1986), are also undermined. Petitioner's jury was largely purged of black jurors through a combination of removal of jurors for cause and use of peremptories. When an appellate court fails properly to review trial court determinations on challenges for cause, it allows the prosecution to strike some black jurors and have bias go undetected, while leaving the state with more peremptory strikes. In Petitioner's case, four of the five women excused for cause on Witt grounds, despite the fact that their testimony indicated that in the appropriate case they would vote for the death penalty, were black.

The Court in Witt relied on the limited discretion of the jury under the post-Furman death statutes to lessen the standard of proof necessary to remove a juror for cause. Witt, 469 U.S. at 422 (citing Gregg v. Georgia, 428 U.S. 153 (1976)). However, in a state like Georgia, with a statute that allows jurors total discretion once a statutory aggravating factor has been found beyond a reasonable doubt,[20] jurors who are willing to weigh the evidence fairly as to guilt and aggravating factors are in largely the same position as the jurors in Witherspoon. Gregg, 428 U.S. at 196 (once statutory aggravating factor is found, jury can vote for death or mercy). As long as a juror would be willing to vote for death in the appropriate case, she is qualified. Under the Georgia statute, the five veniremembers in question in this case should not have been removed for cause.

Although reversal is warranted under Witherspoon when only one juror is improperly removed for cause, Gray, 481 U.S. at 648, in this case five jurors were removed improperly. As a result, the state had five additional peremptory challenges at its disposal. The state had a jury from which not only those who could not vote for death, but also those who would think hard about their responsibility, who would take their charge seriously and had reasonable

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20. *O.C.G.A.* §17-10-30(c); *O.C.G.A.* §17-10-30.1(a) (jury can impose life without parole whenever aggravating factor has been found); Zant v. Stevens, 462 U.S. 862 (1983) (confirming constitutionality of Georgia's "pyramid" death penalty statute).

reservations about voting for death, had been removed.[21] The constitutionality of the death penalty relies on the guided role of the jury as voice of the community. Reviewing courts need guidance from this Court to continue to uphold both the rights of defendants to be protected from juries skewed toward death and the rights of qualified jurors to contribute to the justice-making process.

II. THIS COURT SHOULD GRANT CERTIORARI TO DECIDE WHETHER DISCLOSURE TO THE JURY AT THE PENALTY PHASE OF A HEARSAY STATEMENT BY AN UNNAMED PRISONER AND THE USE OF UNPRECEDENTED, EXTRAORDINARY SECURITY DEVICE TO CONTROL THE DEFENDANT VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS

Petitioner's case presents the federal question of whether presenting a hearsay statement about an alleged statement by the defendant and informing a jury of the use of extraordinary, hidden security measures to control the defendant results in the same presumptive prejudice as when a defendant is forced to appear shackled before the jury. It also presents the federal question of whether the introduction of such evidence poses the same threat to fundamental fairness when it occurs during the sentencing phase as during the guilt-innocence phase. Finally, it raises the issue of whether the need for heightened reliability in the capital sentencing determination is violated when a prosecutor unnecessarily discloses the use of extraordinary security measures which were

21. "MR. PULLEN: The problems that you have - to what degree and so forth? I want you to tell us how you feel about that.
JUROR McDOUGAL: Well, as I said, when you see things on the news you think, you know, that they need to go ahead and handle that. But, once I come in here and look at somebody, it would be very hard for me to be a part of putting someone to death." (V.D. at 1228).

used *in lieu* of shackles for the purpose of not alerting the jury to their use.

In Petitioner's case, the prosecutor resorted to the use of irrelevant and highly prejudicial testimony in an effort to convince the jury that Petitioner was dangerous and volatile and should be sentenced to death. First, the prosecutor obtained testimony, over objection, that an unidentified inmate allegedly had told other law enforcement authorities that Petitioner intended to behave well unless and until he received a death sentence, at which point the sheriff would have to kill him in the courtroom. After eliciting that testimony, the prosecutor stated for confirmation by the witness that, as a result of that information, measures had been taken to secure Mr. Greene in the courtroom "that we haven't previously had in our part of the world." (T. 691).

On appeal, Petitioner argued that admission of that exchange was so prejudicial, unreliable, and improper that it denied him his constitutional right to a fair trial. However, a majority of the Supreme Court of Georgia found no violation of Petitioner's constitutional rights, and in fact did not address any constitutional claims. The dissent concluded that the hearsay and evidence "was so inherently prejudicial that it might well have determined the outcome of the sentencing phase." Greene, 469 S.E.2d at 146. The Georgia court held, first, that the triple layer hearsay statement attributed to Petitioner was admissible to explain the conduct of law enforcement officials in taking security measures at trial, despite the total irrelevancy of that conduct to the issue

at hand.[22] Having found no error in the admission of the hearsay account of the unnamed prisoner, the court went on to hold that the testimony regarding the use of extraordinary security measures was admissible to rebut the sheriff's testimony, elicited on direct, that Petitioner had been a model prisoner. In finding this testimony admissible, the Court ignored the principles that form the basis of this Court's decisions on the constitutionality of shackling defendants at jury trials and on the heightened need for reliability in determining the appropriateness of death in a specific case.

A. This Court Should Grant Certiorari to Provide Guidance on the Issue of Whether Informing the Jury of the Use of Hidden, Extraordinary Security Devices Violates the Defendant's Right to a Fair Trial Where, if Visible to the Jury, Such Devices Would be Inherently Prejudicial and Could Not be Used Without a Showing of Necessity

This Court has recognized that central to the right to a fair trial guaranteed by the Sixth and Fourteenth Amendments is the principle that a criminal defendant is entitled to have his fate decided by a jury "solely on the basis of the evidence introduced at trial, not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at

22. As Chief Justice Benham pointed out in his dissenting opinion, while out-of-court statements may be admissible to explain the conduct of law enforcement officials under Georgia law, that conduct must involve matters relevant to the issues at trial. In Petitioner's case, the sheriff's conduct in employing security measures was "completely irrelevant, just as it would be if the sheriff had utilized extreme security measures in an abundance of caution with no basis to believe they were warranted." Greene v. State, 469 S.E.2d at 145.

trial." Taylor v. Kentucky, 436 U.S. 478, 485 (1978). Accordingly, practices that pose a substantial threat to the "fairness of the fact-finding process" must be subjected to "close judicial scrutiny." Estelle v. Williams, 425 U.S. 501, 503-504 (1976).

Because the sight of security measures can have "a significant effect on the jury's feelings about the defendant," Illinois v. Allen, 397 U.S. 337, 344 (1970), any extreme security measure which is visible to a jury, such as shackling, is inherently prejudicial and may not be implemented unless justified by an essential state interest. Holbrook v. Flynn, 475 U.S. 560, 568-569 (1986). Here, the state used a security device that was hidden under Petitioner's clothes. This device was a "stun belt" whereby an electrical charge could be applied to disable Petitioner by an officer with a remote control device. There was no reason for the jury ever to know the device was being used. By informing the jury that, because of Petitioner's alleged dangerousness, unprecedented security measures had been implemented to control him, the prosecutor caused the same prejudice to Petitioner that until then had been avoided by using a hidden security device. Moreover, alerting the jury to the use of the device after the sentencing hearing had already begun and emphasizing the uniqueness of the device was likely even more prejudicial to Petitioner than forcing him to appear shackled throughout the sentencing hearing would have been.

This Court has recognized that what makes the use of an extraordinary security device such as shackling inherently prejudicial to a defendant is that juries view such devices as "unmistak-

able indications of the need to separate a defendant from the community at large" and as "a sign that [the defendant] is particularly dangerous or culpable." Holbrook, 475 U.S. at 569. As Chief Justice Benham noted in his dissent, a jury, informed by the prosecutor that an extraordinary, hidden security device is being employed to control the defendant, would view that information as even more of an indication of the dangerousness of the defendant than the sight of the defendant in shackles. Greene, 469 S.E.2d at 146 (Benham, C.J., dissenting). Prejudicial impact is not lessened merely because the jury hears about the use of security devices instead of seeing them. When the prosecutor merely alerts the jury to the use of hidden, unprecedented security measures, the jury is left to imagine. Such comments are likely to conjure images of technologically advanced equipment designed for use on people for whom ordinary handcuffs or shackles would not suffice. Moreover, the jurors, once tantalized with knowledge of the use of extraordinary security measures they cannot see, are likely to speculate about what type of device is being used and how it operates. By telling the jury about the use of hidden security measures but not letting the jury see them, the prosecutor succeeds in drawing the jurors' attention to security measures and emphasizing their extraordinariness, thereby causing extreme prejudice.

Furthermore, the prejudicial impact to the defendant is likely to be greater when the jury is alerted to the use of hidden security measures only after the trial has begun. If a security device is used during an entire trial, the jury might think the use

of the device routine or get used to the sight of it. In contrast, when the prosecutor points out only after the jury has found the defendant guilty of murder, that an extraordinary security device is in use, there is no chance that the jury will assume its use is routine. Pointing out the use of extraordinary security measures at a point in the trial when the jury knows that evidence critical to the sentencing determination is being presented augments the prejudicial impact of the measures.

This Court has held that the appearance of a defendant in visible restraints before a jury is so inherently prejudicial that a state can force a defendant to wear shackles only as a "last resort," Illinois v. Allen, 397 U.S. at 359, after "an essential state interest specific to [the] trial" has been shown. Holbrook, 475 U.S. at 568-69. The court's decision in Petitioner's case allows prosecutors to make an end run around the Holbrook requirement of a showing of necessity for the use of shackles.

In no case has this Court addressed the question of whether alerting the jury to the use of extraordinary, hidden security measures poses the same threat to an accused's right to a fair trial as when an accused is forced to appear shackled before a jury. This Court should grant certiorari to provide guidance on this important issue.

B. This Court Should Grant Certiorari to Settle Whether the Use of Extraordinary Security Measures Poses the Same Danger to Fundamental Fairness in the Penalty Phase as in the Guilt-Innocence Phase

Numerous state and federal courts of appeal have addressed the issue of whether the use of visible security measures causes the same threat to the criminal defendant's fundamental right to a fair proceeding during the penalty phase as during the guilt-innocence phase. Because they disagree on the reasoning underlying this Court's shackling cases, courts have reached different conclusions. This Court should grant certiorari to clarify the principles upon which it based its decisions holding the use of extreme security measures inherently prejudicial to defendants, and to settle the contested question of whether the threat to a fair trial is the same in the penalty phase as in the guilt-innocence phase.

In Estelle v. Williams, 425 U.S. 501 (1976), this Court held that the state cannot, consistent with Fourteenth Amendment due process guarantees, compel an accused to stand trial while dressed in identifiable prison clothing because the appearance of the defendant in prison clothes was likely to have a deleterious effect on the presumption of innocence, "a basic component of a fair trial under our system of justice." Id. at 503. Borrowing from this Court's reasoning in Estelle, a number of courts have held that the threat to the defendant's right to a fair trial is lesser in the penalty phase than in the guilt phase because the presumption of innocence is no longer at risk. In Elledge v. State, 408 So.2d 1021 (Fla. 1981), the Supreme Court of Florida, noting that "cases which concern ... prejudice [caused by shackling at trial] deal with the adverse effects that such restraints have upon the presumption of innocence," found "very little prejudice" in the

defendant's appearance at sentencing in leg irons because he "did not stand before the sentencing jury as an innocent man ... [but] rather ... as a confessed murderer of three persons." 408 So.2d at 1022-1023. See also State v. Young, 853 P.2d 327 (Utah 1993) (because presumption of innocence no longer applies, "constitutional foundation for the right to be free from shackles or other restraint no longer exists" during penalty phase); Hunt v. State, 583 A.2d 218 (Md. 1990) (prejudice from shackling stems from effect on presumption of innocence, so less concern about prejudice to defendant shackled at sentencing hearing); Duckett v. State, 752 P.2d 752 (Nev. 1988) (where presumption of innocence inapplicable, constitutional foundation for Estelle right to be protected from prejudice no longer exists, so not error to force defendant to appear before sentencing jury in restraints).

Other courts, rejecting the idea that this Court's rationale in shackling cases has been grounded only in the presumption of innocence, have concluded that visible restraints during the sentencing phase pose an equally serious threat. In Duckett v. Godinez, 67 F.3d 734 (9th Cir. 1995), the Ninth Circuit found the defendant's constitutional rights violated when the state trial court required him to appear in shackles before the jury at his sentencing hearing. Finding no reason to believe that this Court intended otherwise, the court concluded that the constitutional rules regarding the use of visible security measures apply equally in the guilt-innocence and sentencing contexts. Id. at 748. Other courts have reached the same conclusion. See, e.g., Elledge v.

Dugger, 823 F.2d 1439 (11th Cir. 1987) (no reason to restrict principles underlying prohibition against shackling to guilt-innocence phase and finding reversible error where defendant placed in leg irons during sentencing phase); Commonwealth v. Chester, 587 A.2d 1367 (Pa. 1991) (rejecting state's argument that, once presumption of innocence removed, defendant cannot be prejudiced by appearing in front of jury in restraints).

Several important concerns underlie the argument for providing the same constitutional safeguards in the sentencing phase as in the guilt-innocence phase. The penalty phase features a correlate to the guilt-innocence phase's presumption of innocence: the burden is on the state to prove that death is the appropriate punishment. In the guilt phase of the trial, the prosecution must prove beyond a reasonable doubt that the defendant committed the crime of which he stands accused. Likewise, during the penalty phase, the prosecution must prove beyond a reasonable doubt the existence of aggravating factors and that death is the appropriate penalty before death can be imposed. See, e.g., *O.G.C.A.* §7-10-30(c). In Georgia, while the finding of a statutory aggravating circumstance is a prerequisite for imposition of a sentence of death, once such a circumstance has been established, the jury is free to consider any and all evidence presented in aggravation, regardless of whether it relates to a statutory aggravating circumstance. It is thus not sufficient for the prosecution to prove an aggravating circumstance, instead, the prosecution must convince the jury that the case is at the very apex of the pyramid of cases -- that the

defendant is one of most dangerous and therefore one of the most deserving of death. Zant v. Stephens, 462 U.S. 862 (1983). Since future dangerousness is an aggravating factor, and the use of security measures will be understood as a sign that the defendant is dangerous, the same concern about impairment of the presumption of innocence inheres in the penalty phase.

As this Court has acknowledged, exacting standards must be met to assure that any capital case is fair. "The fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special '"need for reliability in the determination that death is the appropriate punishment"' in any capital case." Johnson v. Mississippi, 486 U.S. 578, 584 (1988) (quoting, Gardner v. Florida, 430 U.S. 349, 363-64 (1977) (quoting, Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (White, J., concurring))). Accordingly, the question of whether the death penalty should be imposed can be no less crucial than the question of guilt. Where the decision to impose the death penalty is being decided, there is no reason to afford the defendant less protection from the danger of unfair prejudice. The consequences of an erroneous sentencing decision resulting from such unfair prejudice would be tragic and irreversible. This Court has never addressed the question of whether the use of restraints results in the same threat of unfair prejudice in the sentencing phase as in the guilt-innocence phase. This Court should grant certiorari to settle this important issue in this case.

C. This Court Should Grant Certiorari to Consider Whether a Defendant's Eighth Amendment Right to a Reliable Capital Sentencing is Violated When the Prosecutor, Speaking Before the Jury, Makes References to the Use of Extraordinary Security Measures to Control the Defendant During the Penalty Phase of a Capital Murder Trial

The heightened need for reliability in capital sentencing determinations is well-established in this Court's Eighth Amendment jurisprudence. Because the death penalty is "qualitative[ly] different from all other forms of punishment ..., there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." Woodson v. North Carolina, 428 U.S. 280, 305 (1976). Accord Gardner v. Florida, 430 U.S. 349 (1977); Lockett v. Ohio, 438 U.S. 586 (1978); Beck v. Alabama, 447 U.S. 625 (1980).

The heightened need for reliability in capital sentencing requires that juries' decisions be "based upon reason rather than caprice or emotion." Gardner, 430 U.S. at 358. It also dictates that the prosecution refrain from injecting into consideration at the penalty phase "factors that are constitutionally impermissible or totally irrelevant to the sentencing process...." Zant v. Stephens, 462 U.S. 862, 885 (1983). The Eighth Amendment prohibits prosecutorial practices that threaten the reliability of capital sentencing determinations. See, e.g., Caldwell v. Mississippi, 472 U.S. 320 (1985) (prohibiting prosecutorial arguments that lessen jury's sense of responsibility for determining appropriateness of death).

Like the practices this Court condemned in Caldwell, comments regarding the use of extraordinary security measures pose an unacceptable threat to the reliability of the capital sentencing determination. First, where, as in Petitioner's case, there has been no showing of necessity for the use of extraordinary security devices, such comments draw the jury's attention to a factor completely irrelevant to the sentencing decision. As discussed earlier, this Court has held that extraordinary, visible security measures may not be used at trial absent a showing of "an essential state interest specific to [the] trial," Holbrook, at 568-69, because the jury will interpret them as a sign that the defendant is dangerous. When, as here, no such showing has been made, the use of extraordinary security measures is completely unreliable evidence as to the character of the defendant.

Moreover, disclosure to the jury of the extraordinary security measures in the courtroom to control the defendant is highly prejudicial. In the adversarial setting of the courtroom, jurors expect the prosecutor to argue that the defendant is dangerous and deserving of the maximum punishment. However, the use of extraordinary security measures says more than that the prosecutor believes the defendant to be dangerous -- it adds the imprimatur of law enforcement officials and the judge to the need for extraordinary security measures. As a result, jurors are likely to infer that the prosecutor's mention of the security measures bolsters his argument that the defendant is truly dangerous.

In many cases, disclosing to the jury the use of extraordinary, secret security measures could mean the difference between life and death. Security measures would be taken as a sign of the current and future dangerousness of the defendant. If the jury believes the defendant will remain dangerous indefinitely, it may believe that death is the only way to prevent him from killing again. Where no other evidence has been offered to support a contention of future dangerousness, a prosecutor's improper comments on the use of extreme security measures to control the defendant could mean the difference between life and death. Jurors may feel personally threatened by sitting in the same room with a man who is so dangerous that ordinary security measures would not be adequate to control him. Thus, comments about the use of extreme security measures are likely to result in sentences marred by the improper influence of emotion.

Here, the prosecutor conveyed to the jury that, because of Petitioner's dangerousness, unprecedented security measures had been employed in the courtroom. As Chief Justice Benham noted in dissent, this comment "could reasonably have made the difference between a life or death sentence" for Petitioner. Greene, 469 S.E.2d at 146 (Benham, C.J., dissenting):

> Before the jurors heard the testimony, they likely believed that Greene's crimes were heinous but that they were part of an isolated spree when Greene was addicted to crack cocaine. After the improper testimony, the jurors likely viewed Greene as consistently and fundamentally violent, with or without drugs, and as a threat even to themselves.

The decision of the Georgia Supreme Court clearly conflicts with the heightened need for reliability in capital sentencing determinations. This Court has never addressed whether the disclosure of extraordinary security measures violates the heightened need for reliability in decisions to impose the death penalty. This Court should grant certiorari to answer that crucial question.

III. THIS COURT SHOULD GRANT CERTIORARI TO REVIEW THE DECISION FINDING NO VIOLATION OF THE DEFENDANT'S CONSTITUTIONAL RIGHTS WHEN THE PROSECUTOR CROSS-EXAMINED HIM ABOUT HIS APPLICATION FOR FUNDS FOR A MENTAL HEALTH EVALUATION AND MISCHARACTERIZED THAT APPLICATION FOR FUNDS AS AN ATTEMPT TO FABRICATE A DEFENSE

Mr. Greene's case presents the important federal question of whether, where an indigent defendant has unsuccessfully applied for funds for a mental health evaluation, his rights to due process and equal protection or a fair and reliable determination of sentence are violated when the prosecutor cross-examines him about that application and improperly suggests to the jury that the defendant applied for those funds in order to fabricate an insanity defense.

The defense filed a pre-trial motion for funds for a mental health examination in anticipation of the need to present mitigation evidence at the penalty phase. The state argued strenuously against the granting of such funds and the judge denied the request for funds, over objection. After arguing successfully to deny Petitioner the means with which to explore mental health issues with an expert, the prosecutor questioned Petitioner about his mental health. On cross-examination at the penalty phase, the prosecutor asked Petitioner whether he was mentally retarded, had

ever been to a mental health professional, or had ever suffered mental illness. (T. 759-60). Petitioner answered no to each of those questions, adding that, while he had never been to a psychiatrist in the past, his lawyers had unsuccessfully requested funds for him to see one prior to trial. Even though the defense request had clearly been for funds to explore possible mental health issues for mitigation, the prosecutor then questioned Petitioner about whether the defense had requested funds for a mental health evaluation to fabricate an insanity defense.[23]

The prosecutor used the testimony elicited on cross-examination as well as his own unsupported inference to attack Petitioner during further cross-examination and closing argument, arguing that there was no reason not to impose the death penalty because Petitioner himself had testified that he was not mentally ill or retarded. Thus, after opposing the funds with it could have been reliably determined whether Petitioner suffered from any kind of mental disability, the prosecutor argued that he was mentally healthy. Doing so was fundamentally unfair. On appeal, Petitioner contended that the prosecutor's conduct violated his rights to due process, equal protection, a fair trial, and a reliable sentencing determination. The Georgia Supreme Court did not address any of these constitutional claims, holding only that, because

> there was no issue as to Greene's mental illness or retardation and, when Greene testified in his own behalf, he conceded his sanity and lack of retardation, ... it was not error for the prosecutor to pursue the topic and to argue to the jury that mental illness or retardation was not an impediment to imposition of the death penalty.

Greene v. State, 469 S.E.2d at 139.

The Georgia Supreme Court disregarded the decisions prohibiting the state from penalizing a defendant for exercising his constitutional rights and misleading the jury regarding the actions of defense counsel in preparing for trial. In Ake v. Oklahoma, 470 U.S. 68 (1985), this Court held that an indigent defendant has a right to funds for an expert where the area of expertise is a "significant factor." The Court observed that "justice cannot be equal where, simply as a result of poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake." 470 U.S. at 76. While every defendant may not ultimately be entitled to funds for expert assistance, every defendant certainly has a constitutional right to apply for such funds.

This Court has repeatedly held that a defendant may not be penalized for the exercise of his constitutional rights. See, e.g., Griffin v. California, 380 U.S 609 (1965); United States v. Goodwin, 457 U.S. 368 (1982) ("an individual ... certainly may not be punished for exercising a protected statutory or constitutional right"). In Griffin, this Court held that a prosecutor may not argue to a jury that a defendant's exercise of the Fifth Amendment right to remain silent is evidence of guilt. It reasoned that allowing such comment would be a "penalty ... for exercising a constitutional privilege" that would "cut down on the privilege by

23. "You was trying to get off on being crazy, is that what you're telling the jury?" (T. 760).

making its assertion costly." 380 U.S. at 614. Other courts have applied the Griffin rationale outside of the Fifth Amendment right to remain silent context. See, e.g., United States v. Thame, 846 F.2d 200 (3rd Cir. 1988) (error for prosecutor to argue defendant's reliance on Fourth Amendment rights constituted evidence of guilt); United States v. Taxe, 540 F.2d 961 (9th Cir. 1976), cert. denied, 429 U.S. 1040 (1977); United States ex rel. Macon v. Yeager, 476 F.2d 613 (3d Cir.), cert. denied, 414 U.S. 855 (1973) (error to argue that exercise of Sixth Amendment right to counsel is evidence of guilt); United States v. McDonald, 620 F.2d 559 (5th Cir. 1980).

Petitioner exercised a constitutional right -- his Ake right to apply for funds to obtain expert psychological assistance. The prosecutor's argument that he had applied for expert assistance in an attempt to fabricate an insanity defense, while also being misleading and incorrect, directly urged the jury to penalize Petitioner for the mere fact that he made the application. The Griffin rationale should apply to an indigent defendant's right to funds for an expert under Ake. Allowing the state court's decision to stand would have a chilling effect on the indigent defendant's right to seek funds for assistance of experts. Ake recognized a right to such funds where an initial showing is made that the expert's testimony will be a significant factor in the trial. However, as this case demonstrates, the defendant cannot be sure that such funds will be granted. If he is afraid the prosecution may use the mere fact of his application for funds against him, an

indigent defendant might be dissuaded from applying. Allowing this type of conduct by prosecutors also would severely undermine fundamental fairness and equal protection. Prosecutors could oppose a defendant's effort to prepare a defense and, when successful, use the defendant's failure to get funds against him, as the prosecutor in this case did. Furthermore, only indigent defendants would be put in that position; defendants with resources to hire experts would do so and be prepared to counter the prosecutor's argument. Moreover, wealthy defendants, would not have to apply for funds, so the prosecution would not know that they had attempted to contact an expert.

Furthermore, just as a defendant's invocation of the right to remain silent does not necessarily support an inference of guilt, see Griffin, at 614, a defendant's invocation the right to seek funds for expert mental health assistance does not support an inference that he is trying to fabricate an insanity defense. Indeed, in this case, counsel applied for funds to explore possible mental health issues for the penalty phase, yet the prosecutor improperly and misleadingly argued to the jury that Petitioner, who according to his answers to questions on cross-examination was neither "mentally ill" nor "mentally retarded," must have applied for funds to fabricate an insanity defense. Such highly prejudicial accusations should not be allowed to influence the jury's crucial sentencing determinations unless proven through admissible evidence.

This Court has never spoken on the applicability of the Griffin rationale to an indigent defendant's right to funds to obtain expert psychological assistance. It should grant certiorari to provide guidance to the courts on this crucial issue and to emphasize that such misleading cross-examination and argument during the penalty phase is not permissible under the Eighth Amendment.

CONCLUSION

For all the foregoing reasons, Petitioner respectfully requests that his petition for certiorari be granted.

Respectfully Submitted,

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BY:

Certificate of Service

I hereby certify that the foregoing has been mailed, first class postage affixed, to counsel for the state:

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this 24th day of July, 1996.

Attachment A

GREENE

v.

The STATE.

No. S95P1366.

Supreme Court of Georgia.

March 15, 1996.

Reconsideration Denied March 28, 1996.

Defendant was convicted in the Superior Court, Taylor County, E. Mullins Whisnant, J., of murder, armed robbery, and aggravated assault and sentenced to death, and he appealed. The Supreme Court, Carley, J., held that: (1) court did not err in excluding jurors who expressed opposition to death penalty; (2) state established legitimate reasons for exercise of peremptory challenges against black prospective jurors; (3) evidence sustained the conviction; (4) evidence of out-of-court statements was admissible to rebut defendant's evidence at penalty phase that he had been a model prisoner; (5) prosecutor's references to Bible during closing argument at penalty phase were not improper; and (6) death penalty was not excessive or disproportionate.

Affirmed.

Fletcher, P.J., concurred specially in part.

Benham, C.J., concurred in part and dissented in part and filed an opinion in which Sears, J., joined.

Sears, J., filed an opinion concurring in part and dissenting in part.

1. Costs ⇐302.3

Defendant was not entitled to funds for investigative assistance in the absence of showing that investigator was necessary to his defense or that trial was rendered unfair because he was denied the funds.

2. Costs ⇐302.4

Defendant was not entitled to funds for mental health evaluation in the absence of threshold showing that his mental health would be an issue in either guilt or punishment phase of trial; conclusory statements that attorneys needed assistance to determine whether defendant's mental health would be a significant issue were insufficient to entitle defendant funds in the absence of evidence or testimony to support the statements.

3. Jury ⇐108

Standard for determining when prospective juror may be excluded for cause because of his or her views on capital punishment is whether the juror's views would prevent or substantially impair performance of his duties as a juror in accordance with instructions and oath.

4. Jury ⇐108

Court properly disqualified prospective jurors after exhaustive and conscientious effort to determine whether their views on death penalty would prevent or substantially impair the performance of their duties, even though, at some point during voir dire, each of the prospective jurors may have given answers which, considered in isolation, would indicate that opposition to the death penalty was not automatic.

5. Jury ⇐108

In order for juror to be disqualified because of views on death penalty, it is not necessary that disqualification appear with unmistakable clarity.

6. Criminal Law ⇐1158(3)

Relevant inquiry in reviewing disqualification of juror because of views on the death penalty is whether trial court's finding that proper standard for death penalty disqualification was met as to each prospective juror is fairly supported by the record, considered as a whole.

7. Criminal Law ⇐1158(3)

On review of disqualification of juror because of death penalty views, appellate court should not substitute its findings for those of the trial court; a conclusion that prospective juror is disqualified for bias is one based upon findings of demeanor and credibility, which are peculiarly within trial

court's province, and those findings are to be given deference by appellate courts.

8. Jury ⇐108

Claim that court should disqualify prospective juror based on purported bias in favor of death penalty is controlled by Supreme Court's *Wainwright* decision.

9. Jury ⇐33(5.15)

Where defendant established prima facie case of discrimination against six African-American prospective jurors, court properly required prosecutor to articulate reason for each of the peremptory strikes.

10. Jury ⇐33(5.15)

Batson does not demand that explanation proffered by prosecutor for peremptory strike of black venireperson be persuasive or even plausible; legitimate reason is not one that makes sense but, rather, a reason that does not deny equal protection.

11. Jury ⇐33(5.15)

Prosecutor established legitimate reasons for peremptory strikes against black venirepersons by noting that one expressed sympathy for cocaine users who engage in uncharacteristic criminal activity, second failed to disclose criminal conviction, third failed to report for jury duty the first day and reported kidney problem which would interfere with her service, fourth was a single mother with no family in town to assist with child care, fifth expressed reservations about the death penalty, and sixth was a single mother with doubtful child care arrangements who expressed hesitation about the death penalty.

12. Jury ⇐33(5.15)

State's proffered reason for striking potential juror is sufficient to rebut prima facie showing of racial discrimination so long as it is racially neutral, related to the case, clear, and reasonably specific.

13. Jury ⇐33(5.15)

Once race neutral explanation has been tendered for peremptory strike of venireperson, trial court must decide whether purposeful racial discrimination has been proven.

14. Jury ⇐33(5.15)

First step in establishing prima facie case of purposeful discrimination in use of peremptory strikes is to establish that prospective juror belongs to cognizable racial or ethnic group.

15. Jury ⇐33(5.15)

Defendant did not show that Asian Indians are cognizable group for purposes of jury selection and thus did not establish prima facie case of racial discrimination by virtue of prosecutor's strike of the only prospective juror who was of Asian Indian descent.

16. Jury ⇐107

Prospective juror who initially indicated that he would tend to believe police officer over defendant but later stated he would judge police officer's credibility by the same criteria as any witness was not disqualified.

17. Jury ⇐131(4)

Court did not improperly restrict defendant's voir dire either by limiting efforts to rehabilitate two prospective jurors who repeatedly expressed unwavering opposition to death penalty or by disallowing questions of technical legal nature.

18. Assault and Battery ⇐92(4)
Homicide ⇐250
Robbery ⇐24.15(2)

Defendant's convictions for murder, armed robbery, and aggravated assault were supported by evidence that he entered convenience store, held knife to clerk's throat, cut her across the fingers and stabbed her through the lung and liver, and fatally stabbed customer who entered the establishment, and that he then went to the home of a couple for whom he had worked and stabbed them, and then went to another convenience store where he held a knife to the cashier and forced her to give him money.

19. Criminal Law ⇐1171.1(6)

Any impropriety in prosecutor's reference in opening statement to murder victim's popularity and reference in closing argument to sympathy for the victim's family did not, in all reasonable probability, change result of trial.

20. Criminal Law ⇐730(14)

There was no reasonable probability that prosecutor's comments during closing argument referring to murder victim's mother's crying during trial changed the result of the trial, in view of instruction to the jurors to put the incident out of their minds.

21. Criminal Law ⇐369.2(4, 6), 371(4, 8)

Evidence of assaults and robbery which took place in other counties following murder, robbery, and assault with which defendant was charged was admissible as elements of one crime spree, evidence of defendant's bent of mind, and evidence of the circumstances of his arrest.

22. Criminal Law ⇐720(5)

Prosecution's indication that some of its witnesses had testified in trials in other counties arising out of the same crime spree for which defendant was standing trial was not improper bolstering of the witnesses.

23. Homicide ⇐178(1)

Defendant was not entitled to question deputy sheriff as to whether victim's cousin had ever been investigated for any crime, where defendant's identity as perpetrator of murder was not contested.

24. Criminal Law ⇐368(1)

Evidence that victim of assault committed by defendant in another county as part of crime spree for which he was on trial heard her husband say "Don't come in here; don't come in here" was admissible as part of the res gestae.

25. Criminal Law ⇐1170.5(1)

Defendant did not show any harm from fact that son of persons whom he attacked in another county as part of crime spree for which he was on trial was asked if he knew any reason why defendant would have attacked his parents, even if question was improper.

26. Criminal Law ⇐720(1)

Where state was properly permitted to question two witnesses about prior inconsistent statements, prosecutor's references to the inconsistent statements in closing argument were not improper. O.C.G.A. § 24-9-83.

27. Criminal Law ⇐902

Trial court did not err in failing to instruct on impeachment after state questioned two witnesses about prior inconsistent statements, where defendant admitted that such an instruction was unnecessary.

28. Criminal Law ⇐720(7.1, 9)

Prosecutor's characterization of defendant as "mean" was not improper but, rather, legitimate inference to be drawn from evidence of murder and assaults which he committed.

29. Criminal Law ⇐723(1), 1171.1(6)

It was improper for prosecutor to ask jurors rhetorically what they would have done in the situation of one of the victims of assault, as jurors were thereby invited to place themselves in the victim's place in regard to the crime itself, but error was harmless in view of overwhelming evidence of defendant's guilt.

30. Criminal Law ⇐721(3, 6)

Prosecutor did not improperly shift burden of proof to defendant or comment on defendant's failure to testify by remarking to the jurors that they had heard nothing that showed that victim deserved to die nor any evidence of self-defense.

31. Criminal Law ⇐721.5(1)

It is not improper for prosecutor to comment on failure of defense to present evidence to rebut the state's evidence of guilt.

32. Criminal Law ⇐722.3

Prosecutor's comment during closing argument on defendant's demeanor in the courtroom was not improper.

33. Criminal Law ⇐730(1)

Court's admonition to prosecutor that punishment was not appropriate topic for guilt-innocence phase was sufficient to address any confusion in the minds of the jurors from the prosecutor's two references to sentencing phase during the guilt phase.

34. Criminal Law ⇐723(1)

It was not error for prosecutor to pursue defendant's sanity and lack of retardation during closing argument at sentencing phase or to argue that mental illness or retardation was not an impediment to the imposition of the death penalty.

35. Criminal Law ⇐1177

Where jury's finding of statutory aggravating circumstance was clearly supported by the record, defendant's crimes were gruesome and unprovoked, and his evidence in mitigation was weak, there was no reasonable probability that, but for one witness' expression of opinion as to sentencing, jury would have returned a life sentence.

36. Homicide ⇐358(1)

Court was authorized to preclude defendant from questioning his witnesses at penalty phase of capital murder prosecution about matters that called for speculation or witnesses' religious or philosophical attitudes about the death penalty.

37. Criminal Law ⇐730(14)

There was no error in prosecutor's comment, which could reasonably be construed as referring to possibility of defendant's escape rather than to his parole, where trial court gave curative instructions.

38. Criminal Law ⇐728(2)

Even if prosecutor's sentencing phase references to possibility that defendant would escape if sentenced to life imprisonment did violate statute prohibiting comment on possibility of parole, defendant's failure to move for mistrial resulted in waiver of his statutory rights. O.C.G.A. § 17-8-76(a, b).

39. Criminal Law ⇐419(1)

Out-of-court statement is considered "hearsay" only if it is offered to prove the truth of what is contained therein.

See publication Words and Phrases for other judicial constructions and definitions.

40. Criminal Law ⇐419(2, 8)

Where defendant had called sheriff during sentencing phase to testify that defendant was a model prisoner, sheriff's testimony on cross-examination that sheriff had been told by another inmate that defendant had indicated that he would behave properly unless and until he received death penalty was not hearsay, as it was not offered to prove the truth of that statement but, rather, to show the reason for his conduct and the fact that it was not consistent with a model prisoner.

41. Homicide ⇐358(1)

Sheriff's testimony for defendant during sentencing phase of capital murder prosecution that defendant had acted as a model prisoner rendered the conduct of the sheriff and defendant a relevant topic of inquiry and state was properly permitted to show that defendant's "model prisoner" conduct was merely a ploy to evade the death penalty.

42. Criminal Law ⇐695(5)

Hearsay objection to sheriff's testimony concerning what one inmate had told him about defendant's reasons for behaving properly while in jail did not carry over to testimony by the sheriff concerning security measures in the courtroom.

43. Criminal Law ⇐1137(5)

Where topic of defendant's status as model prisoner while awaiting trial had been introduced by the defendant himself at sentencing phase, he could not object to state's general showing that security measures utilized during trial were not those which would be employed during the trial of a model prisoner.

44. Criminal Law ⇐723(1)

Religion may play a part in sentencing phase of death penalty trial, but it is improper for prosecutor to urge imposition of death penalty based upon defendant's beliefs or to urge that the teachings of particular religion mandate imposition of that sentence; prosecutor may allude to such principles of divine law relating to transactions of men as may be appropriate to the case.

45. Criminal Law ⇐723(1)

Prosecutor's closing argument at penalty phase which consisted of references to principles of divine law related to penological justifications for the death penalty, including concept of retribution and whether, considering enormity of his crime, defendant should be extended mercy, was not improper.

46. Criminal Law ⇐1037.1(2), 1171.1(6)

Even if prosecutor's references to Bible during penalty phase of capital murder prosecution was improper, reversal was not required where there was no objection and no reasonable probability that the argument changed the result of the trial.

47. Criminal Law ⇐1171.1(6)

There was no reasonable probability that prosecutor's reference during closing argument of penalty phase to victim's weeping mother who had been escorted from courtroom during guilt-innocence phase resulted in imposition of death sentence.

48. Criminal Law ⇐721.5(2)

It was not improper for prosecutor to comment at sentencing phase on failure of defendant to produce witnesses as to certain of his contentions.

49. Criminal Law ⇐720(1)

Although prosecutor's statement during penalty phase that videotape of defendant's confession had been in evidence for some time may not have been accurate, where confession had been admitted, reference to the length of time it had been in evidence could not have misled the jury into returning death sentence.

50. Homicide ⇐356

Sentence of death imposed upon defendant who was convicted of murder, armed robbery, and assault as part of crime spree which also involved assaults on three other persons was not excessive or disproportionate. O.C.G.A. § 17-10-35(c)(1).

Taylor County Superior Trial Judge: Hon. E. Mullins Whisnant.

William L. Kirby, II, Columbus, Charlotta Norby, Stephen B. Bright, Atlanta, Herbert L. Wells, Perry, for Greene.

Douglas C. Pullen, Dist. Atty., Columbus, for State.

Michael J. Bowers, Atty. Gen., Atlanta, J. Gray Conger, Dist. Atty., Lori L. Canfield, Asst. Dist. Atty., Columbus, Susan V. Boleyn, Senior Asst. Atty. Gen., Atlanta.

Patsy Morris, Atlanta, for other interested parties.

Michael Mears, MultiCounty Public Defender, Atlanta.

Joseph L. Chambers, Sr., Prosecuting Attorneys Council, Smyrna, for other interested parties.

Paula K. Smith, Asst. Atty. Gen., Atlanta, for other appellee.

CARLEY, Justice.

Daniel Greene was convicted of the murder of a customer in a convenience store and he was also convicted of armed robbery and of committing an aggravated assault against the store clerk. As an aggravating circumstance, the jury found that the murder had been committed during the course of the armed robbery and Greene was sentenced to death. OCGA § 17-10-30(b)(2). For the armed robbery, he received a life sentence and, for the aggravated assault, a 20-year sentence. Greene appeals from the judgments entered by the trial court.[1]

Pre-Trial Rulings

[1] 1. The trial court did not abuse its discretion in denying Greene's motion for funds for investigative assistance, since Greene failed to show that an investigator was necessary to his defense or that his trial was rendered unfair because he was denied funds for investigative assistance. See

1. The crimes occurred on September 27, 1991. Greene was indicted on October 14, 1991. On June 15, 1992, the state filed its notice of intent to seek the death penalty. Voir dire commenced on November 30, 1992, and the trial of the case began on December 5, 1992. On December 7, 1992, the jury returned its verdict finding Greene guilty of the crimes charged. The jury returned its sentencing phase verdict on December 8, 1992, and the trial court sentenced Greene on December 9, 1992. Greene filed a motion for new trial on March 22, 1993. He amended the motion on May 4, 1994. The trial court denied the motion on March 24, 1995. Greene filed his notice of appeal on April 25, 1995. The case was docketed on May 22, 1995, and orally argued on September 18, 1995.

Isaacs v. State, 259 Ga. 717, 725(13), 386 S.E.2d 316 (1989); *Rogers v. State*, 256 Ga. 139, 145(8), 344 S.E.2d 644 (1986).

[2] Likewise, Greene also failed to make a threshold showing that his mental health would be an issue in either phase of trial. Compare *Bright v. State*, 265 Ga. 265(2)(e, f), 455 S.E.2d 37 (1995). Instead, his attorneys merely made conclusory statements that they needed assistance to determine whether Greene's mental health would be a significant issue, and they offered no evidence or testimony to support those conclusory statements. See *Todd v. State*, 261 Ga. 766, 772(11), 410 S.E.2d 725 (1991); *Roseboro v. State*, 258 Ga. 39, 41(3)(d), 365 S.E.2d 115 (1988). It follows that the trial court did not err in denying Greene's request for funds for a mental health evaluation.

Jury Selection

2. Greene contends that the trial court erred in excusing five prospective jurors for cause based upon their opposition to the death penalty.

[3] *Wainwright v. Witt*, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985) is the controlling authority as to the death-penalty qualification of prospective jurors and its holding is unmistakably clear and unambiguous. The proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment

> is whether the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." We note that, in addition to dispensing with *Witherspoon* [*v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968),] reference to "automatic" decisionmaking, this standard likewise does not require that a juror's bias be proved with "unmistakable clarity." This is because determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism. What common sense should have realized experience has proved: many veniremen simply cannot be asked enough questions to reach the point where their bias has been made "unmistakably clear"; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings. Despite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law.... [T]his is why deference must be paid to the trial judge who sees and hears the juror.

Wainwright v. Witt, supra at 424–426 (II), 105 S.Ct. at 852–53.

[4–7] Contrary to Greene's contentions, the transcript of voir dire does not show that any of the prospective jurors were disqualified merely for expressing "qualms" about the death penalty or for "leaning" toward a life sentence. Rather, the prospective jurors were disqualified only after the trial court undertook an exhaustive and conscientious effort to determine whether their views on the death-penalty would prevent *or* substantially impair the performance of their duties in accordance with their instructions and oaths. It is not determinative that, at some point during voir dire, each of the prospective jurors may have given answers which, if considered in isolation, would indicate that his or her opposition to the death penalty was not "automatic." Likewise, it is not necessary that the disqualification of each of the prospective jurors may not appear with "unmistakable clarity." The relevant inquiry is whether the trial court's finding that the proper standard for death-penalty disqualification was met as to each of the prospective jurors is "fairly supported" by the record "considered as a whole." *Wainwright v. Witt*, supra at 433 (IV), 105 S.Ct. at 857. On review, an appellate court should not substitute its findings for those of the trial court. *Wainwright v. Witt*, supra at 434 (IV), 105 S.Ct. at 857. The conclusion that a prospective juror is disqualified for bias is one that is based upon findings of demeanor and credibility which are peculiarly within the trial court's province and such findings are to be given deference by appellate courts. *Wainwright v. Witt*, supra at 428 (III), 105 S.Ct. at 854. Applying this controlling authority here, it is clear that, whatever ambiguity may exist in the record of the voir dire, "the trial court, aided as it undoubtedly was by its assessment of [the prospective jurors'] demeanor[s], was entitled to resolve it in favor of the State." *Wainwright v. Witt*, supra at 434 (IV), 105 S.Ct. at 857.

Greene's contention that the trial court erred in excusing the prospective jurors is based upon a fundamental misconstruction of *Witherspoon v. Illinois*, supra. *Witherspoon* did not create any new ground for challenging a prospective juror in a death-penalty case, but merely addressed the long-recognized ground of disqualification for bias in the context of a death-penalty case. *Wainwright v. Witt*, supra at 423 (II), 105 S.Ct. at 851–52.

> [T]here is nothing talismatic about juror exclusion under *Witherspoon* merely because it involves capital sentencing juries. *Witherspoon* is not grounded in the Eight Amendment's prohibition against cruel and unusual punishment, but in the Sixth Amendment. Here, as elsewhere, the quest is for jurors who will conscientiously apply the law and find the facts. That is what an "impartial" jury consists of, and we do not think, simply because a defendant is being tried for a capital crime, that he is entitled to a legal presumption or standard that allows jurors to be seated who quite likely will be biased in his favor.

Wainwright v. Witt, supra at 423 (II), 105 S.Ct. at 851–52. Because a contrary holding would be based upon an unauthorized "talismatic" interpretation of *Witherspoon* and a misapplication of the controlling authority of *Wainwright*, the trial court's finding that the prospective jurors were disqualified must be affirmed.

[8] 3. Greene urges that it was error to fail to disqualify a prospective juror based upon her purported bias in favor of the death penalty. However, this enumeration likewise is controlled by *Wainwright* and the trial court was authorized to find that the "final distillation" of the prospective witness' thoughts demonstrated her qualification. *Taylor v. State*, 261 Ga. 287, 292(5), 404 S.E.2d 255 (1991).

4. Contrary to Greene's contentions, the record reflects that the trial court was even-handed in its efforts to obtain a jury whose members would not be biased either for or against the imposition of the death penalty.

[9] 5. In the State's exercise of its peremptory strikes, Greene established a prima facie case of discrimination against six African-American prospective jurors. See *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986); *Osborne v. State*, 262 Ga. 214, 215(3), 430 S.E.2d 576 (1993); *Davis v. State*, 263 Ga. 5, 7(10), 426 S.E.2d 844 (1993). Therefore, the trial court properly required the prosecutor to articulate the reasons for each of these peremptory strikes. Greene contends that the trial court erred in accepting the prosecutor's articulated reasons, urging that those reasons were neither supported by the record nor applied to white prospective jurors.

[10–12] Contrary to Greene's contention, a thorough review of the voir dire of each of the six prospective jurors reveals a valid racially-neutral basis for the employment of a peremptory strike. *Batson* does not demand that the explanation proffered by a prosecutor be "persuasive, or even plausible." *Purkett v. Elem*, — U.S. —, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995). "'[A] 'legitimate reason' is not a reason that makes sense, but a reason that does not deny equal protection." *Purkett v. Elem*, supra at —, 115 S.Ct. at 1771. The prosecutor correctly noted that the first prospective juror expressed sympathy for cocaine users who engage in uncharacteristic criminal activity, the second failed to disclose a criminal conviction, the third failed to report for jury duty the first day and reported a kidney problem which would interfere with her service, the fourth was a single mother with no family in town to assist with child care, the fifth expressed reservations about the death penalty, and the sixth was a single mother with doubtful child care arrangements who expressed hesitation about the death penalty. The white prospective jurors to whom Greene points for comparison did not in fact give comparable answers on voir dire. For example, those with

small children were able to make arrangements for child care, none had health problems which would interfere with service, and those with some hesitation regarding the death penalty were favorable to the State in other ways. The State's proffered reason for striking a potential juror is sufficient to rebut a prima facie showing of racial discrimination so long as it is racially-neutral, related to the case, clear and reasonably specific. *Gamble v. State*, 257 Ga. 325, 327(5), 357 S.E.2d 792 (1987). The State's explanations met this test and the fact that the State accepted no similarly situated white prospective juror undercuts any motive to exclude African Americans. See *Osborne v. State*, supra at 216-217(3), 430 S.E.2d 576.

[13] Although Greene did respond to the reasons articulated by the prosecutor, he urges that the trial court erred in failing to afford him a more extensive opportunity to rebut those proffered reasons. However, once a race-neutral explanation has been tendered, the trial court must then decide whether purposeful racial discrimination has been proven. *Purkett v. Elem*, supra at ——-——, 115 S.Ct. at 1770-71. The prosecutor's proffered explanations in this case satisfied the State's burden of articulating a nondiscriminatory reason for the strikes and the inquiry thus was properly framed for the trial court's determination. *Purkett v. Elem*, supra at ——, 115 S.Ct. at 1771.

[14, 15] Greene further contends that the trial court erred in ruling that the State need not articulate its reasons for exercising a peremptory strike against the only prospective juror who was of Asian Indian descent. However, the first step in establishing a prima facie case of purposeful discrimination is to establish that the prospective juror belongs to a cognizable racial or ethnic group. See *Batson*, 476 U.S. at 94, 106 S.Ct. at 1721-22; *Powers v. Ohio*, 499 U.S. 400, 402, 111 S.Ct. 1364, 1365, 113 L.Ed.2d 411 (1991). Greene did not even attempt to show that Asian Indians are a cognizable group and he cites no authority for aggregating racial or ethnic groups. It follows that Greene failed to establish a prima facie case of racial discrimination against Asian Indians under *Batson*. See *United States v. Bucci*, 839 F.2d 825, 833 (1st Cir.1988), cert. denied 488 U.S. 844, 109 S.Ct. 117, 102 L.Ed.2d 91 (1988).

[16] 6. Although a prospective juror initially indicated that he would tend to believe a police officer over a defendant, he later stated that he would judge a police officer's credibility by the same criteria as any witness. It follows that the trial court did not err in denying Greene's challenge to this prospective juror for alleged bias in favor of the police. See *Foster v. State*, 248 Ga. 409, 410(3), 283 S.E.2d 873 (1981). See also *Johnson v. State*, 262 Ga. 652(2), 424 S.E.2d 271 (1993).

[17] 7. The trial court did not improperly restrict Greene's voir dire either by limiting his efforts to rehabilitate two prospective jurors who repeatedly expressed unwavering opposition to the death penalty or by disallowing questions of a technical legal nature. See *Spencer v. State*, 260 Ga. 640, 641(1)(d), 398 S.E.2d 179 (1990); *Baxter v. State*, 254 Ga. 538, 543(7), 331 S.E.2d 561 (1985).

The Guilt-Innocence Phase of Trial

[18] 8. The evidence presented at trial authorized the jury to find the following facts:

On the evening of September 27, 1991, Greene made a series of trips to the Suwanee Swifty, a convenience store and gasoline station in Reynolds, Taylor County, Georgia. During his final visit, Greene grabbed the store clerk, Virginia Wise, held a knife to her throat, and told her to give him the money from the cash register. After obtaining the money, $142.55, Greene continued to hold the knife to Wise's throat. He pulled her to the back room, then cut her across three fingers and stabbed her through the lung and liver. Upon hearing the automatic doorbell ring as Bernard Walker entered the store, Greene placed Wise against the bathroom wall, telling her that if she left the room he would have to kill her. Greene reentered the public area of the store and encountered Walker waiting at the counter to make a purchase. He stabbed Walker in the heart, threw down the knife, left the store and drove away. After attempting to get help, Walker fell dead in the parking lot.

Later that evening, Greene went to the home of Willie and Donice Montgomery, an elderly couple in rural Macon County for whom Greene had worked as a farm laborer for about two months. Greene burst through the Montgomerys' kitchen door wielding a knife and asked for their car keys. Mr. Montgomery gave Greene the keys, and Greene proceeded to stab each victim multiple times in the head.

After leaving the Montgomerys, home, Greene drove their car to a convenience store in Warner Robins, Houston County, Georgia. Once there, he held a butcher knife to the cashier, Bonnie Roberts, and forced her to give him the money from the cash register. He then walked toward her and attempted to stab her in the chest. She bent down, and Greene drove the knife into the back of her shoulder. Greene then drove the Montgomerys' car to the home of an acquaintance in Warner Robins, where he was apprehended.

Greene was tried separately and convicted of the Macon and Houston County crimes. The trial from which this appeal is taken concerned only Greene's indictment for the crimes committed in Taylor County.

Before trial, Greene confessed to the crimes, explaining in a videotaped interview that he had committed them to obtain money for crack cocaine. At trial, Greene testified that he could not remember committing the crimes or confessing, and that he could only recall experiencing a severe headache inside the Suwanee Swifty after having smoked a cigarette given to him earlier by an acquaintance. He theorized that his criminal behavior might have been induced by the cigarette, which must have been laced with a powerful, mind-altering drug.

The evidence is sufficient to enable any rational trier of fact to find Greene guilty of the crimes charged beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

[19] 9. Assuming, without deciding, that the prosecutor's reference in his opening statement to the murder victim's popularity in the community, and his comment to the jurors in closing argument that they could not help but have sympathy for the victim's family were improper, Greene failed to object and those comments did not, in all reasonable probability, change the result of trial. See *Todd v. State*, supra at 767(2)(a), 410 S.E.2d 725.

[20] 10. When the murder victim's mother began crying and was escorted from the courtroom, Greene moved for a mistrial. The trial court denied the motion, but did give curative instructions. When, in his closing argument, the prosecutor made reference to this incident, Greene immediately objected and the trial court again instructed the jurors to put the incident out of their minds. Thereafter, Greene failed to move for a mistrial or any additional instructions and we find no reasonable probability that the prosecutor's comments changed the result of trial. *Todd v. State*, supra at 767(2)(a), 410 S.E.2d 725.

11. The record does not support Greene's contention that his right against self-incrimination was violated by references to his decision not to testify.

12. Likewise, the record does not support Greene's contention that there were improper references made to his failure to testify at his earlier trial in another county.

[21] 13. Greene urges that the trial court erred in admitting evidence of the crimes that he committed in Macon and Houston counties on the evening of September 27, 1991, and early morning of September 28, 1991, immediately following his commission of the crimes for which he was on trial in the present case. However, those crimes were admissible as elements of one crime spree and as evidence of Greene's bent of mind and of the circumstances of his arrest. See *Todd v. State*, supra at 771(7), 410 S.E.2d 725; *Davis v. State*, 255 Ga. 598, 605(9), 340 S.E.2d 869 (1986); *Ingram v. State*, 253 Ga. 622, 632(6), 323 S.E.2d 801 (1984).

Greene further contends that the jury was exhorted to convict him as punishment for the crimes he committed in Macon and Houston counties. In context, however, the prosecutor's remarks conveyed to the jurors that they should only consider evidence of those crimes for proper purposes, such as its ten-

dency to rebut the defense theory that Greene merely ran into Walker accidentally as Greene was running out of the Suwanee Swifty with a knife in his hand.

[22] 14. The State indicated that various of its witnesses had testified in the Macon or Houston County trials regarding Greene's alleged crime spree. By doing so, the State did not engage in improper bolstering of those witnesses. Furthermore, Greene failed to object, and there is no reasonable probability that the outcome of the trial was changed. See *Todd v. State*, supra at 767(2)(a), 410 S.E.2d 725.

[23] 15. When Greene attempted to question the deputy sheriff as to whether the victim's cousin had ever been investigated for any crime, the trial court sustained the State's relevance objection. There was no error in this evidentiary ruling, since Greene's identity as the perpetrator was not contested.

[24] 16. On direct examination, Ms. Montgomery, one of the Macon County victims, testified that when Greene was coming in the door of her home, she heard her husband say, "Don't come in here; don't come in here." The statement was admissible as part of the res gestae. See *Jarrett v. State*, 265 Ga. 28, 29(2), 453 S.E.2d 461 (1995).

[25] 17. During direct examination of the Montgomerys' son, the prosecutor asked, "Mr. Montgomery, is there anything you know, any reason you know why Daniel Greene would want to go in there and do that to your mom and dad?" The witness answered in the negative. Assuming, without deciding, that the question was improper, Greene has failed to show harm.

[26, 27] 18. The trial court did not err in allowing the State to question two witnesses about their prior inconsistent statements, since the requirements of OCGA § 24–9–83 were met. See *Meschino v. State*, 259 Ga. 611, 613(2), 385 S.E.2d 281 (1989). It follows, therefore, that the prosecutor's references to the inconsistent statements in closing argument were not improper. The trial court did not err in failing to instruct on impeachment, since Greene admitted that such an instruction was unnecessary. See *Jones v. State*, 242 Ga. 893, 895(5), 252 S.E.2d 394 (1979).

19. Greene contends that the prosecutor's closing argument was improper in several respects.

[28] (a) Contrary to Greene's contention, the prosecutor did not improperly vouch for the credibility of an eyewitness, but merely defended the witness' credibility against impeachment.

(b) The prosecutor's characterization of Greene as "mean" was not improper, but was a legitimate inference to be drawn from the evidence.

[29] (c) It was improper for the prosecutor to ask the jurors rhetorically what they would have done in Wise's situation, "as the jurors were thereby 'invited to place themselves in the victim's place in regard to the crime itself. (Cit.)' [Cit.]" *Burgess v. State*, 264 Ga. 777, 785(20), 450 S.E.2d 680 (1994). However, as was the case in *Burgess*, the error was harmless given the overwhelming evidence of Greene's guilt.

[30–32] (d) The prosecutor did not improperly shift the burden of proof to Greene or comment on Greene's failure to testify by remarking to the jurors that they had heard nothing that showed the victim deserved to die nor any evidence of self-defense. It is not improper to comment on the failure of the defense to present evidence to rebut the State's evidence of guilt. See *Thornton v. State*, 264 Ga. 563, 567(4)(a), 449 S.E.2d 98 (1994). Likewise, the prosecutor's comment on Greene's demeanor in the courtroom was not improper. See *Christenson v. State*, 261 Ga. 80, 88(7)(b), 402 S.E.2d 41 (1991).

(e) Greene's contention that the prosecutor improperly alluded to extra-judicial knowledge of a witness lacks merit. Read in context, the comment was merely a logical deduction from evidence presented at trial.

(f) The prosecutor did not invoke his expertise as a basis for returning a verdict as to Greene's guilt or the imposition of the death penalty. See *Conklin v. State*, 254 Ga. 558, 573(11)(b), 331 S.E.2d 532 (1985). Moreover, as was the case in *Conklin*, supra at 573(11)(b), 331 S.E.2d 532, considering the evidence that was presented, "it is unlikely that prosecutorial experience or expertise played a discernable role in the jury's evaluation of the vileness and brutality of [Greene's] crime[s]."

(g) Contrary to Greene's contention, the prosecutor neither misstated the burden of proof nor misled the jury on the definition of "malice aforethought."

[33] (h) The prosecutor made two references to the sentencing phase of the trial and, after each reference, the trial court admonished the prosecutor that punishment was not an appropriate topic for the guilt-innocence phase. We conclude that the court's admonitions were sufficient to address any confusion in the minds of the jurors.

The Sentencing Phase of Trial

[34] 20. There was no issue as to Greene's mental illness or retardation and, when Greene testified in his own behalf, he conceded his sanity and lack of retardation. Accordingly, it was not error for the prosecutor to pursue that topic and to argue to the jury that mental illness or retardation was not an impediment to imposition of the death penalty.

[35] 21. Greene urges that a witness was erroneously allowed to give an opinion as to sentencing. *Childs v. State*, 257 Ga. 243, 256(19)(b), 357 S.E.2d 48 (1987). However, there was no objection at trial. Moreover, the jury's finding of a statutory aggravating circumstance was clearly supported by the record, Greene's crimes were gruesome and unprovoked, and his evidence in mitigation was weak. Under these circumstances, we do not find a reasonable probability that, but for the witness' expression of his opinion, the jury would have returned a life sentence. See *Ford v. State*, 255 Ga. 81, 94(8)(i), 335 S.E.2d 567 (1985).

[36] 22. Greene urges that the direct examination of his witnesses in mitigation was erroneously curtailed. However, the trial court was authorized to disallow questions which called for speculation or a witness' religious or philosophical attitudes about the death penalty. *Childs v. State*, supra at 256(19)(b), 357 S.E.2d 48.

23. Relying upon OCGA § 17–8–76(a), Greene urges that, on numerous occasions, the prosecutor made a reference to the possibility of parole and that the trial court failed to declare a mistrial.

[37, 38] On one occasion, the prosecutor made a comment which could reasonably be construed as referring to the possibility of Greene's escape rather than to his parole. In response to Greene's motion for a mistrial, the trial court nevertheless gave curative instructions and we find no error. See *Finney v. State*, 253 Ga. 346, 348(5), 320 S.E.2d 147 (1984). This was Greene's only motion for mistrial based upon OCGA § 17–8–76 and on no other occasion did the prosecutor mention the word "parole." Even assuming that the prosecutor's other references violated the tenor of OCGA § 17–8–76(a), Greene's failure to make a motion for a mistrial under OCGA § 17–8–76(b) resulted in a waiver of his statutory right thereunder. *Finney v. State*, supra at 348(5), 320 S.E.2d 147.

24. Greene contends that, in the cross-examination of his witnesses in mitigation, the State was erroneously allowed to use evidence of his other criminal activities in violation of OCGA § 17–10–2. However, not only was there a failure to object, OCGA § 17–10–2 was not applicable and there was no error. *Christenson v. State*, supra at 90(8)(a), 402 S.E.2d 41.

[39, 40] 25. Greene contends that an out-of-court statement attributed to him was inadmissible hearsay and that the Sheriff of Taylor County was erroneously allowed to testify to that statement. However, an out-of-court statement is considered hearsay only if it is offered to prove the truth of what is contained therein. *Bundrage v. State*, 265 Ga. 813, 814(2), 462 S.E.2d 719 (1995). Here, the out-of-court statement was not offered to prove that Greene spoke the truth when he said that he was prepared to behave unless and until he received the death penalty. To the contrary, the out-of-court statement was offered to explain the pre-sentencing conduct of Greene and the Sheriff and, if their pre-

sentencing conduct was a relevant inquiry, the statement would be admissible as original evidence and not as an exception to the hearsay rule. *Bundrage v. State*, supra at 814(2), 462 S.E.2d 719; *Teague v. State*, 252 Ga. 534(1), 314 S.E.2d 910 (1984).

[41] Greene called the Sheriff as his own witness during the sentencing phase and, on direct examination, Greene undertook to show that he had been a model prisoner who was amenable to incarceration. This direct examination rendered the conduct of Greene and the Sheriff a relevant topic of inquiry by the State on cross-examination. If it could, the State should be allowed to show that Greene's previous "model prisoner" conduct was merely a ploy to evade the death penalty and to show that the Sheriff's previous conduct in securing Greene's person was not consistent with that afforded a "model prisoner." See *Blake v. State*, 239 Ga. 292, 295(1), 236 S.E.2d 637 (1977). The out-of-court statement attributed to Greene accomplished both purposes. It explained Greene's pre-sentencing conduct toward the Sheriff and it explained the Sheriff's pre-sentencing conduct toward Greene, showing that the conduct of neither was consistent with the "model prisoner" status which Greene's direct examination of the Sheriff had intimated. Since it was Greene himself who rendered the inquiry into the pre-sentencing conduct of himself and the Sheriff a relevant topic, he cannot object that the State thereafter sought to explain that conduct with admissible original evidence. Under OCGA § 24-9-64, the State, as the opposite party, had the right to a thorough and sifting cross-examination of the witnesses whom Greene had called in an effort to avoid the death penalty.

[42, 43] At some point after Greene's out-of-court statement had been introduced over Greene's hearsay objection, the prosecutor questioned the Sheriff with general regard to the security measures that had been taken in the courtroom. Greene did not object to the question that the prosecutor posed to the Sheriff or to the Sheriff's answer thereto. The only objection that was ever raised by Greene was a hearsay objection to the Sheriff's testimony regarding the out-of-court statement attributed to Greene. That hearsay objection would not be broad enough to extend to a question and answer which were related, not to any out-of-court statement, but to the Sheriff's in-court actions. In any event, the mere passing reference to extraordinary-but-unspecified security measures was not inadmissible. Since the topic of Greene's status as "model prisoner" had been introduced by Greene himself, he cannot object that the State made a general showing that security measures utilized during his trial were not those which would be employed during the trial of a "model prisoner."

26. During closing argument in the sentencing phase, the prosecutor made references to certain Biblical teachings. Although Greene made no objection to these references in the trial court, he urges on appeal that those references mandate a reversal of his death sentence.

[44] It is not and has never been the law of this state that religion may play no part in the sentencing phase of a death-penalty trial. As *Hill v. State*, 263 Ga. 37, 46(19), 427 S.E.2d 770 (1993) clearly holds, in Georgia, it is improper for the prosecutor to urge imposition of the death penalty based upon the defendant's beliefs or to urge that the teachings of a particular religion mandate the imposition of that sentence, but the prosecutor nevertheless " 'may allude to such principles of divine law relating to transactions of men as may be appropriate to the case.' (Cit.) *Conner v. State*, 251 Ga. 113, 122-123, 303 S.E.2d 266 (1983)." *Hill v. State*, supra at 46(19), 427 S.E.2d 770. See also *Crowe v. State*, 265 Ga. 582, 593(18)(d), 458 S.E.2d 799 (1995).

> [I]t is clear that neither the Eighth Amendment nor OCGA § 17-10-35(c)(1) ([cit.]) forbids a death penalty based in part on an emotional response to factors in evidence which implicate valid penological justifications for the imposition of the death penalty. Perforce, argument by the prosecutor which "dramatically appeals" to such legitimate emotional response is not "constitutionally intolerable."

Conner v. State, supra at 122(5), 303 S.E.2d 266.

[45] Greene points to nothing in the prosecutor's argument which urged the imposition of the death sentence based upon his religious belief or urged that the teachings of a particular religion mandated the imposition of that sentence against him. Rather, the argument challenged by Greene consists entirely of references to principles of divine law related to the penological justifications for the death penalty, including the concept of retribution and whether, considering the enormity of his crime, Greene should be extended mercy. It is just this type of argument that was found to be authorized in *Hill* and *Crowe*.

[46] Moreover, even assuming that the prosecutor's argument was impermissible, it does not follow that Greene's death sentence must be reversed. On the issue of whether the prosecutor's argument in this case, to which there was no objection, warrants a reversal of the death sentence, *Crowe* and *Hill* cannot be distinguished and, as controlling authority, those cases mandate a finding that "there is no reasonable probability that this argument, even if improper, changed the result of the trial. [Cit.]" *Crowe v. State*, supra at 593(18)(d), 458 S.E.2d 799.

27. Greene enumerates as error various other instances of alleged improper argument by the prosecutor in the sentencing phase.

(a) Contrary to Greene's contention, the prosecutor limited his argument to reasonable inferences from the evidence and to matters within common knowledge. See *Hall v. State*, 259 Ga. 412, 414(2), 383 S.E.2d 128 (1989).

[47] (b) When the prosecutor mentioned the victim's weeping mother who had been escorted from the courtroom during the guilt-innocent phase, Greene made no objection and we find no reasonable probability that this reference resulted in the imposition of the death sentence. *Ford v. State*, supra at 94(8)(i), 335 S.E.2d 567.

(c) Argument regarding general deterrence was not improper. *Fleming v. State*, 265 Ga. 541, 542, 458 S.E.2d 638 (1995).

(d) Argument regarding the bias and impeachment of Greene's mother as a character witness was not improper.

[48] (e) It was not improper for the prosecutor to comment on the failure to produce witnesses as to certain of Greene's contentions. See *Isaac v. State*, 263 Ga. 872, 874(4)(b), 440 S.E.2d 175 (1994).

[49] (f) The prosecutor's statement that the videotape of Greene's confession had been in evidence for some time may not have been accurate, but the confession had been admitted and the reference to the length of time it had been in evidence could not have misled the jury into returning a death sentence.

28. Greene enumerates as error the trial court's refusal to give several of his requested charges. However, our review of the record shows that Greene's requests were either improper or were covered by the full and fair charge that was given by the trial court.

29. The trial court's failure to give certain charges which were never requested was not error.

[50] 30. We do not find that Greene's death sentence was imposed under the influence of passion, prejudice, or other arbitrary factor. See OCGA § 17-10-35(c)(1). The death sentence is not excessive or disproportionate to penalties imposed in similar cases, considering both the crime and the defendant. The similar cases listed in the Appendix support the imposition of the death sentence in this case.

Judgments affirmed.

All the Justices concur, except HUNSTEIN, J., who concurs in the judgment and in all divisions except Division 26, FLETCHER, P.J., who concurs specially, and BENHAM, C.J., and SEARS, J., who concur in part and dissent in part.

APPENDIX

Mobley v. State, 265 Ga. 292, 455 S.E.2d 61 (1995); *Ledford v. State*, 264 Ga. 60, 439 S.E.2d 917 (1994); *Meders v. State*, 261 Ga. 806, 411 S.E.2d 491 (1992); *Gibson v. State*,

APPENDIX—Continued

261 Ga. 313, 404 S.E.2d 781 (1991); *Lee v. State*, 258 Ga. 762, 374 S.E.2d 199 (1988); *Moon v. State*, 258 Ga. 748, 375 S.E.2d 442 (1988); *Frazier v. State*, 257 Ga. 690, 362 S.E.2d 351 (1987); *Spivey v. State*, 253 Ga. 187, 319 S.E.2d 420 (1984); *Mincey v. State*, 251 Ga. 255, 304 S.E.2d 882 (1983); *Wilson v. State*, 250 Ga. 630, 300 S.E.2d 640 (1983); *Jones v. State*, 249 Ga. 605, 293 S.E.2d 708 (1982); *Solomon v. State*, 247 Ga. 27, 277 S.E.2d 1 (1980); *Dick v. State*, 246 Ga. 697, 273 S.E.2d 124 (1980).

FLETCHER, Presiding Justice, specially concurring in part.

I concur in the majority opinion except for the rationale of Division 25.

Greene's evidence during the sentencing phase that he was a model prisoner made relevant his conduct during his incarceration prior to trial. Therefore, the state's evidence that Greene made violent threats while purporting to be a model prisoner was admissible.

Greene's attempt to show that he had been a model prisoner while in the custody of the Sheriff of Taylor County did not, however, make relevant the fact that the Sheriff of Clayton County undertook extraordinary security measures during trial. Had an objection been raised, the trial court should have sustained it because that evidence was not relevant.

The admission of this evidence, even if over objection, was not so highly prejudicial as to require reversal. Visible signs of extraordinary security and conditions such as shackles and prison clothing are considered highly prejudicial because they are "constant reminder[s] of the accused's condition."[1] The challenged evidence here was a passing reference to unspecified security measures. In the absence of any details or embellishment, this brief statement was unlikely to influence the jury as would the constant sight of shackles.

BENHAM, Chief Justice, concurring in part and dissenting in part.

I concur in the affirmance of Greene's convictions, but I must respectfully dissent to the affirmance of the death sentence on several grounds. First, the trial court erred in excusing for cause several prospective jurors who said that they could vote for the death penalty but would have qualms about it. Second, the prosecutor improperly elicited testimony in the sentencing phase that, based on hearsay suggesting Greene might become violent at sentencing, extreme and unprecedented measures were taken to secure the courtroom. Finally, the prosecutor improperly urged execution on religious grounds. Each of these errors requires reversal of the sentence under settled principles of law.

1. Greene contends that the trial court committed reversible error in excusing five prospective jurors for cause on the ground that they opposed the death penalty. In Division Two of its opinion, the majority dismisses this contention as unsupported both factually and legally. Yet the majority opinion fails to provide any summary of the voir dire and fails to cite any of our cases interpreting the standard articulated in *Wainwright v. Witt*. In fact, the record shows that although the prospective jurors expressed qualms about the death penalty, four of them unambiguously indicated on voir dire that they could vote to impose a death sentence in an appropriate case. Therefore, this case is indistinguishable from *Jarrell v. State*, 261 Ga. 880(1), 413 S.E.2d 710 (1992), and reversal is required.

The standard for death-qualification is whether the prospective juror's views on capital punishment would "prevent or substantially impair the performance of [her] duties in accordance with [her] instructions and [her] oath." *Wainwright v. Witt*, 469 U.S. 412, 424, 105 S.Ct. 844, 852, 83 L.Ed.2d 841 (1985), quoting *Adams v. Texas*, 448 U.S. 38, 45, 100 S.Ct. 2521, 2526, 65 L.Ed.2d 581 (1980). If a venire member merely indicates on voir dire that she would have difficulty imposing a death sentence, has qualms about the death penalty or is leaning toward a life sentence, she may not be disqualified on that basis. See *Jarrell v. State*, 261 Ga. at 880(1), 413 S.E.2d 710 (reversing death sentence where juror who was excused for cause said capital punishment is justifiable for bad crimes but that she had qualms, was not sure she could vote for it, and would probably lean toward a life sentence); *Isaacs v. State*, 259 Ga. 717(24), 386 S.E.2d 316 (1989); *Alderman v. State*, 254 Ga. 206(4), 327 S.E.2d 168 (1985). *Wainwright v. Witt* does not alter the holding of *Witherspoon* that

> a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction.

Witherspoon v. Illinois, 391 U.S. 510, 522, 88 S.Ct. 1770, 1777, 20 L.Ed.2d 776 (1968). See *Alderman*, 254 Ga. at 207(4), 327 S.E.2d 168. To eliminate from the venire all persons voicing such scruples is to distort the "conscience of the community" which the jury is assembled to express. See *Witherspoon*, 391 U.S. at 519–520, 88 S.Ct. at 1775–76. That distortion in turn undermines the legitimacy of the judicial process in the exercise of its unparalleled power to determine whether an individual citizen will live or die. Execution of a death sentence imposed by a jury of such skewed composition would unconstitutionally deprive the defendant of life without due process of law. See id. at 523, 88 S.Ct. at 1777–78.

Examining in detail the voir dire of each of the prospective jurors in turn, it is plainly apparent that exclusion of at least four of them was clear error under the standard articulated in *Wainwright v. Witt* and applied in *Jarrell v. State*:

The first of the four prospective jurors indicated that it would be harder for her to impose the death penalty than a life sentence, that she would hate to know that she helped to put someone to death, and that she leaned toward a life sentence. However, she said unequivocally and repeatedly that she could vote for the death penalty under appropriate circumstances. She stated that her hesitation about the death penalty would not affect her decision on conviction. Asked if she would want jurors like herself to serve if the victim were her son, she said that she would not, but she explained that as the victim's mother, she would want revenge.

Although the second of the prospective jurors initially stated that she was conscientiously opposed to the death penalty, she then clearly stated that under some circumstances she would vote for it. She expressed "some serious concerns about the death penalty," primarily of a religious nature, commenting on the price she would have to pay for partaking in something that resulted in the taking of another's life. When then asked by the prosecutor if it would be fair to say that, for religious or other reasons, she just had a feeling against the death penalty, she said, "Okay, I have a feeling against the death penalty." She also agreed that her predisposition was long-held. She reiterated on continued questioning by the prosecutor that although she had problems with the death penalty, she would be open-minded enough to consider all the evidence and that she was not leaning toward either sentence in advance in this case, although in general she leans toward life. When the court asked her if she could "just lay aside [her] religious beliefs," she said that she could not say definitely that she would be able to do so. Thereafter, the prosecutor asked her if she could "just casually cast aside" her views, and the juror answered, "I don't think you can just casually cast aside what's going to happen to someone's life." On repeated questioning, she said that she would bring her views to the jury room. However, she stated that her reservations would not keep her from considering the evidence and the instructions of the court, that she would listen to both sides, and that she would vote to impose the death penalty if the evidence warranted it. These responses clearly do not disqualify the juror from service. *Wainwright v. Witt* does not require that a prospective juror casually cast off her religious views at the jury room door, nor that she lack serious concern about imposing the death penalty.

The third of the prospective jurors, when asked whether she was conscientiously op-

1. *Estelle v. Williams*, 425 U.S. 501, 504, 96 S.Ct. 1691, 1693, 48 L.Ed.2d 126 (1976).

posed to the death penalty, said, "Well, I've never ... in my heart felt like that you should take one life for another. So, you know, it's kind of hard for me to answer." When the court asked her if she was so conscientiously opposed to capital punishment that she would not vote for the death penalty under any circumstances, she said that if upon hearing all of the evidence she was totally convinced that the death penalty was appropriate, she would vote for it. Later, when asked whether she could ever impose the death penalty, she contradicted her earlier answer, saying, "I don't know. It'd just be hard for me to do it. I guess my answer would have to be no." However, she explained that she was having a hard time answering without having the benefit of any evidence about the case. She said that, because of her lack of information, she did not have a leaning toward either sentence at that time. She then clearly responded to a series of the court's questions by indicating that she *could* vote to impose the death penalty. She did express misgivings about having to send someone to the electric chair. Also, when the prosecutor asked her if it bothered her that the case was a death penalty case, she said that, having never been involved in one, she did have some reservations. The prosecutor then asked her,

> So, really and truly, insofar as the death penalty is concerned, your mind is not impartial between the two penalties, you would favor a life sentence just automatically because of the way you feel?

She answered, "Well, I wouldn't say that automatically, I mean, I would rather go for a life sentence than the death penalty." The prosecutor then asked the juror whether he would be able to talk her out of her personal views on the death penalty, and she responded that it would take more than just him. The state notes that the juror seemed to take offense at questions about the death penalty, but she explained that the questioning made her feel as if she were on trial. Again, the juror's answers, taken as a whole, clearly do not disqualify her from service. The law does not require complete impartiality between sentencing options in the abstract, nor does it disqualify from jury service all citizens with any misgivings about electrocution. Furthermore, the law requires jurors to impose the death penalty only when they have been convinced to do so by the facts in evidence, never by the arguments of counsel.

The fourth of the prospective jurors said she was not conscientiously opposed to the death penalty. Then, on first being asked whether she could vote for death in the electric chair, she said, "I don't think so." After reiterating that view several times, she said that under some circumstances, she probably could vote for the death penalty. Ultimately, in response to the court's questions, she said that she was not leaning toward either sentence. When the prosecutor began his questioning, she explained the apparent conflict in her answers, saying that she had not understood the questions at first, but that her decision about the penalty would depend entirely on the evidence and circumstances. She said she would probably vote for life imprisonment and that her belief that she would probably do so is one from which the prosecutor could not dissuade her. Finally, after the prosecutor asked her to concede that she is opposed to the death penalty, that she could never vote for it, and that she could not cast her beliefs aside, the juror said,

> I still say it all depends on what the circumstances are. I would have to first weigh it in my mind and think about it. But I just couldn't right off say, yes or no.

After more prodding, she said,

> Well, you know, I've told you I would have to hear what the evidence is and everything, and the surrounding things that led up to it or what's what. I couldn't just right off say yes or no.

In questioning by the defense, she clearly stated that she could vote for the death penalty. Despite strong and repeated coaxing down the path of disqualification, the prospective juror clearly demonstrated that she was qualified to serve.

Clearly these prospective jurors did not, as the majority indicates, merely at some point in voir dire give answers which, if considered in isolation, would indicate that their opposition to the death penalty was not "automatic." Nor is the record of voir dire ambiguous. On the contrary, each of the prospective jurors stated unambiguously that she could vote to impose the death penalty after considering all of the evidence and instructions. The majority's deference to the trial court's imagined findings regarding demeanor and credibility, under these facts, seriously undermines this court's ability ever to review any excusal for cause under *Wainwright v. Witt*. As such, it is a dramatic departure from precedent. See, e.g., *Jarrell*, 261 Ga. at 880(1), 413 S.E.2d 710.

Prosecutors, like defense attorneys, have available to them peremptory strikes. The prosecutor in this case could and did use a number of peremptory strikes to remove jurors perceived to lean toward a life sentence. However, the trial court's practice of removing for cause any prospective juror with serious concerns about imposing the death penalty was plainly unconstitutional. See *Witherspoon*, 391 U.S. at 523, 88 S.Ct. at 1777–78. "In its quest for a jury capable of imposing the death penalty, the State produced a jury uncommonly willing to condemn a man to die." Id. at 520–521, 88 S.Ct. at 1776.

Because the voir dire of four jurors who were excused for cause, viewed as a whole, fails to fairly support the trial court's finding that any was disqualified, the death penalty cannot stand. See *Davis v. Georgia*, 429 U.S. 122, 123, 97 S.Ct. 399, 399–400, 50 L.Ed.2d 339 (1976); *Pope v. State*, 256 Ga. 195 (7d & e), 345 S.E.2d 831 (1986). Therefore, I must respectfully dissent.

2. In Division 25, the majority holds that the trial court properly admitted testimony regarding an out-of-court statement allegedly made by Greene to another inmate, because it was not hearsay and was admissible to explain the conduct of Greene, as well as the conduct of the sheriff in employing certain security measures at trial. The majority further holds that testimony regarding the security measures themselves was admissible to rebut the witness' testimony that Greene had behaved in prison. On the contrary, admission of testimony as to both Greene's alleged statements and the security measures was highly improper and so prejudicial that it may well have determined the outcome of the sentencing phase of trial.

This case was tried in Clayton County. Over objection, the court permitted Sheriff Giles of Taylor County to testify on cross-examination that he had told the sheriff of Clayton County that an inmate had reported to Giles a statement that Greene allegedly made to the inmate. Specifically, Giles testified that Greene allegedly told the inmate that Greene would behave and there would be no trouble during trial up to the moment the jury announced its sentencing phase verdict, whereupon, if Greene received a death sentence, the sheriffs would have to kill Greene in the courtroom, and "that would be the end of it." After eliciting the testimony, the prosecutor asked Giles whether, as a result of the information, there were measures taken to secure Greene in the courtroom "that we haven't previously had in our part of the world." Giles answered in the affirmative, and no further evidence was offered regarding the measures which had been taken.

The majority holds that the testimony regarding Greene's alleged statements to the inmate was admissible not as hearsay but as original evidence to explain the conduct of the sheriff of Clayton County in taking security precautions. However, although out-of-court statements are sometimes admissible to explain the conduct or motive of a law enforcement officer, the conduct must involve matters relevant to the issues on trial. *Morris v. State*, 264 Ga. 823(2), 452 S.E.2d 100 (1995); *Teague v. State*, 252 Ga. 534(1), 314 S.E.2d 910 (1984). Although any actions of or threats made by Greene which might have prompted the sheriff to employ extreme security precautions might arguably be relevant to rebut testimony regarding Greene's good conduct, the sheriff's conduct in actually employing those measures was completely irrelevant, just as it would be if the sheriff had utilized extreme security measures in an abundance of caution with no basis to believe that they were warranted. Therefore, admission of the information that formed the basis of the sheriff's conduct cannot be justified on the ground that it was original evidence explaining his conduct.

Nor can admission be justified on the novel theory, never advanced by the state or trial

court, that the testimony is not hearsay because it was offered to explain Greene's conduct. If the evidence was offered for that purpose, it had to have been offered to prove the truth of the matter asserted, and it was therefore hearsay.

Finally, even if Greene's alleged statements were admissible to rebut testimony that Greene behaved himself in prison, the state could at best introduce the alleged statements through the inmate who, according to the sheriff, told him what Greene had allegedly said. Yet the state never even attempted to call the inmate as a witness. Therefore, Greene had no opportunity to impeach the inmate's credibility.

Testimony that Greene's dangerousness required unprecedented security measures was not only inadmissible under any theory, it was highly prejudicial. It is widely recognized that any extreme security measure which is visible to a jury, such as shackling, is inherently prejudicial and may not be implemented unless justified by an essential state interest after giving the defendant an opportunity to contest the information which is its basis. See *Holbrook v. Flynn*, 475 U.S. 560, 568–569, 106 S.Ct. 1340, 1345–1346, 89 L.Ed.2d 525 (1986); *Elledge v. Dugger*, 823 F.2d 1439, 1450–1452 (11th Cir.1987), *cert. denied* 485 U.S. 1014, 108 S.Ct. 1487, 99 L.Ed.2d 715. In this case, Greene had been fitted with a "stun" belt which was deliberately concealed under his clothing to avoid unfairly prejudicing Greene. The state had not attempted to show that an essential state interest required the use of security measures that would be visible to the jury, and it certainly made no showing that the jury needed to be informed of concealed security measures. Informing the jurors of the alleged *need* to employ extreme measures was far more prejudicial than merely permitting them to view shackles would have been, as the jurors might have assumed shackling was routine.

Testimony that Greene allegedly threatened violence in the courtroom, and that unprecedented security measures had been employed to control him, could reasonably have made the difference between a life or death sentence for Greene. Before the jurors heard the testimony, they likely believed that Greene's crimes were heinous but that they were part of an isolated spree when Greene was addicted to crack cocaine. After the improper testimony, the jurors likely viewed Greene as consistently and fundamentally violent, with or without drugs, and as a threat even to themselves.[1]

Because the evidence consisted of hearsay and testimony regarding matters wholly irrelevant to the issues at trial, all of which was so inherently prejudicial that it might well have determined the outcome of the sentencing phase, its admission mandates that Greene's death sentence be overturned. Therefore, I must respectfully dissent.

3. In Division 26, the majority concludes, citing *Hill v. State*, 263 Ga. 37(19), 427 S.E.2d 770 (1993), that because the prosecutor did not urge imposition of the death penalty based upon Greene's religious beliefs and did not specifically urge that the teachings of a particular religion mandate imposition of the death penalty, the prosecutor's religious arguments were not improper. However, the prosecutor did implicitly urge the jury that certain passages of the Bible, as interpreted by the Baptist faith, mandate imposition of the death penalty in this case. First, he informed the jury that he was "a plain old country Baptist." He then argued as follows:

> Let's get down to what this trial and what the laws are all about and this is retribution. An eye for an eye. A tooth for a tooth. Right there in the Bible with all those nice things that I'm sure that the lawyers over there ... are going to be talking about. But no act in that Bible took those words out of it.
>
> And one more thing. Remember this, that that was a limiting, limiting liberal rule in the old testament. That is, if you and I had an eye taken out you could not take out two. It was not to be harsh but to be limiting, to be just. How do we put it now? Let the punishment fit the crime.

Later, the prosecutor argued:

> As you hear that word mercy there is one phrase from the Sermon on the Mount that I want you to hear at the same time. I'm not going to be able to come back and talk to you. But at the same time you hear those lawyers yell mercy hear blessed are the merciful for they shall obtain mercy. And you drank [sic] his whole and entire being and see if you can find a grain of mercy extended to anybody.

Thus, the prosecutor's arguments were improper under *Hill*. See 263 Ga. at 46(19), 427 S.E.2d 770. Furthermore, *Hill* merely provides two examples of prohibited religious argument, not an exhaustive list. Neither it nor *Crowe v. State*, 265 Ga. 582(18d), 458 S.E.2d 799 (1995), which involved a far less extensive religious reference in rebuttal to defense efforts to play on religious sentiments, limit our ability to find error in new prosecutorial approaches to religious discourse. Religion should not be urged, however cleverly, as a basis for a jury's sentencing decision in a death penalty trial. See, e.g., *Jones v. Kemp*, 706 F.Supp. 1534, 1559 (N.D.Ga.1989). See also *United States v. Giry*, 818 F.2d 120, 133 (1st Cir.1987) (prosecutor's reference to religion constituted irrelevant and inflammatory appeal to jurors' religious beliefs and warranted "especial condemnation"), *cert. denied* 484 U.S. 855, 108 S.Ct. 162, 98 L.Ed.2d 116.

It is true that defense counsel did not object to the prosecutor's improper references to religion. However, the improprieties in this case were of such magnitude that there is a reasonable probability that they may have altered the outcome of the sentencing phase. See *Ford v. State*, 255 Ga. 81 (8i), 335 S.E.2d 567 (1985). The prosecutor did not stop at quoting Biblical text. Instead, he directed the jurors' attention to Biblical passages which, in context, are subject to varying interpretations, and, speaking with a voice of authority, interpreted them virtually to require imposition of the death penalty. Furthermore, he disparaged mercy as a valid sentencing consideration, thereby striking at "the most important component of a capital jury's discretion favoring capital defendants." See *Jones v. Kemp*, 706 F.Supp. at 1560, citing *Wilson v. Kemp*, 777 F.2d 621, 626 (11th Cir.1985), *cert. denied* 476 U.S. 1153, 106 S.Ct. 2258, 90 L.Ed.2d 703. Therefore, because of the impropriety of the prosecutor's argument, the sentence of death must be vacated, and I respectfully dissent.

4. In Division 23, the majority briefly dismisses Greene's contention that the prosecutor made improper references to parole, on the ground that Greene waived his rights by failing to move for a mistrial. I address this enumeration because I believe the prosecutor's misconduct in referring to parole likely contributed to the impact of the erroneous admission of the sheriff's testimony in determining the outcome of the sentencing phase of trial.

Pursuant to OCGA § 17–8–76(a), no attorney shall argue to or in the presence of the jury that a defendant, if convicted, may not be required to suffer the full penalty imposed by the court or jury due to pardon, parole or clemency. If an attorney does so, opposing counsel may request a mistrial, in which case it is mandatory that the trial court grant the motion. See id. at (b). The statute proscribes all reference to parole. *Davis v. State*, 255 Ga. 598, 616(25), 340 S.E.2d 869 (1986). Greene argues that his sentence must be reversed because the prosecutor made frequent references to parole, and the trial court failed to declare a mistrial.

During the cross-examination of Greene, the prosecutor asked Greene if he wanted to go to Georgia's electric chair. Greene testified that he did not. The prosecutor then asked Greene if he wanted to spend the rest of his life in the Georgia penitentiary. Greene responded, "Yes, sir, .. I would appreciate that." The prosecutor reacted with disbelief, saying, "You want to? You're saying, gosh, please let me do that, I don't ever want to breathe a free breath?" Greene answered as follows:

> Well, you know, life in prison is better than death. You know what I'm saying? You will have, you might have an opportunity to get out, you might not. But that's the chance you've got to take.

1. The impact of this image was magnified by the prosecutor's improper references to the possibility that Greene would be released if sentenced to life in prison and would be a next-door-neighbor to someone, perhaps a juror. This issue is discussed in Division 4, infra.

Having coaxed Greene into purportedly opening the door to testimony regarding the possibility of release, the prosecutor then asked Greene if he had told the deputy that when he "got out," he was going to buy himself a Nissan pickup truck. Then, the prosecutor asked Greene whether, "by one means or another ... [he] want[ed] to get out where there are more knives and more dope." Later, the prosecutor asked, "You would reach for any straw that you could find to try to save your life so you could get out and get that Nissan pickup truck, wouldn't you?" Greene's attorneys did not object to any of the challenged questions.

In closing argument, the prosecutor asked the jurors whether Greene had given them "the slightest indication that this trial is anything more to him than some kind of hindrance between him and his Nissan pickup truck." Later, after informing the jury that there are knives and drugs in prison, the prosecutor asked the jurors to put themselves in the position of a young man who has made a mistake and gone to prison, is putting his life together, and is introduced to Greene as his new roommate. He then went on to argue:

> Put another way, so long as breath is in him he's going to be living next door to somebody. Do you want him living next door to you? What would you do if he came to your door with a butcher knife in his hands? Put it on a personal basis and then understand a little bit more about what he does.

Once again, the defense failed to object.

Although the prosecutor never specifically used the word "parole," his arguments and questions clearly were intended to refer to the possibility that the defendant "might not be required to suffer the full penalty imposed by the court." See OCGA § 17-8-76. The purpose of the statute prohibiting such remarks is to prevent prosecutors from urging the jury to give a more severe sentence to compensate for, or avert, possible pardon, parole or other clemency. See *Gilreath v. State*, 247 Ga. 814, 835(15), 279 S.E.2d 650 (1981). "The jury should not be encouraged to recommend the death penalty because it fears that parole officials may grant parole if the defendant is given a life sentence." *Davis v. State*, 255 Ga. at 615(25), 340 S.E.2d 869. In this case, the prosecutor clearly intended to urge the jury to sentence Greene to death lest he be released on parole. I am unpersuaded that Greene's concession on cross-examination, that he would not genuinely *like* to be incarcerated for the remainder of his life and would prefer to be freed at some juncture, opened the door to the prosecutor's otherwise prohibited conduct. Nor am I persuaded that the prosecutor's juxtaposition of a discussion of prison roommates with an argument that Greene might someday live next door to a juror obscured the implication that Greene would be released someday if not sentenced to die. The prosecutor violated the spirit and letter of the law in maneuvering to introduce improper considerations in the sentencing phase of trial. The improper references to parole compounded the impact of the prosecutor's other misconduct and reinforce my conviction that the death sentence should be reversed.

For the foregoing reasons, I respectfully dissent. I am authorized to state that Justice Sears joins this dissent.

SEARS, Justice, concurring in part and dissenting in part.

I join fully in the Chief Justice's partial concurrence and dissent. I write separately in order to call special attention to two serious concerns raised by the majority's affirmance of Greene's death sentence. First, in Division Two, the majority relies entirely upon the standard enunciated in *Wainwright v. Witt*[1] in dismissing Greene's argument that the trial court committed reversible error by dismissing five prospective jurors because they expressed varying degrees of opposition to the death penalty, without considering this Court's treatment of *Wainwright*. Our cases interpreting the *Wainwright* standard establish that a prospective juror may not be disqualified merely for stating on voir dire that they would have difficulty imposing the death penalty, that they have misgivings about the death penalty, or that they would tend to lean toward a life sentence.[2] The record of voir dire in this case, explained at length in the Chief Justice's opinion, makes it clear that under our case law interpreting *Wainwright*, each of the five prospective jurors was qualified to serve, and that the trial court committed reversible error in ruling otherwise.

Second, in division 26 the majority opinion sanctions the State's use of certain religious teachings in arguing for the imposition of the death penalty, contrary to our law. In Georgia, it is improper to urge that the teachings of a particular religion command the imposition of the death penalty.[3] Rather, jurors must be charged with sentencing on the death penalty, as in all cases, in accordance with the laws of the State.[4] The prosecutor's direct references during closing argument to the Baptist faith, biblical commandments concerning retribution and mercy, and the Sermon on the Mount, all of which are quoted in the Chief Justice's opinion, constituted inflammatory appeals to the private religious beliefs of the jurors, and therefore were improper.[5] Such comments are especially unjustifiable coming from a State's attorney, "whose duty is as much to refrain from improper methods calculated to produce a conviction as it is to use every legitimate means to bring about a just one."[6]

1. 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985).

2. See *Jarrell v. The State*, 261 Ga. 880, 881, 413 S.E.2d 710 (1992); *Isaacs v. The State*, 259 Ga. 717, 731, 386 S.E.2d 316 (1989); *Alderman v. The State*, 254 Ga. 206, 207, 327 S.E.2d 168 (1985). See also *Witherspoon v. Illinois*, 391 U.S. 510, 522, 88 S.Ct. 1770, 1777, 20 L.Ed.2d 776 (1968) (quoted at p. 2 of the Chief Justice's opinion).

3. *Hill v. The State*, 263 Ga. 37, 45, 427 S.E.2d 770 (1993); *Evans v. Thigpen*, 809 F.2d 239 (5th Cir.1987), cert. denied, 483 U.S. 1033, 107 S.Ct. 3278, 97 L.Ed.2d 782 (1987).

4. See *Jones v. Kemp*, 706 F.Supp. 1534, 1559 (N.D.Ga.1989).

5. *Id.*

6. *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314 (1935).

Attachment B

SUPREME COURT OF GEORGIA

Case No. S95P1366 Atlanta, March 29, 1996

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

DANIEL GREENE V. THE STATE

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

All the Justices concur, except Benham, C.J., and Sears, J., who dissent.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I hereby certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Sherie M. Welch, Clerk.

Attachment C

ATTACHMENT C

SECTION A -- CALIFORNIA -- TOTAL 54 CASES

8. People v. Rodrigues, 8 Cal.4th 1060, 885 P.2d 1, 36 Cal.Rptr.2d 235 (Cal., Dec 01, 1994) (NO. S007779)

9. People v. Freeman, 8 Cal.4th 450, 882 P.2d 249, 34 Cal.Rptr.2d 558, 31 A.L.R.5th 888 (Cal., Oct 24, 1994) (NO. S004787)

12. People v. Fudge, 7 Cal.4th 1075, 875 P.2d 36, 31 Cal.Rptr.2d 321 (Cal., Jun 30, 1994) (NO. CRIM. 26424, S004790)

14. People v. Garceau, 6 Cal.4th 140, 862 P.2d 664, 24 Cal.Rptr.2d 664 (Cal., Nov 18, 1993) (NO. S004776)

15. People v. Wash, 6 Cal.4th 215, 861 P.2d 1107, 24 Cal.Rptr.2d 421 (Cal., Nov 18, 1993) (NO. S004780, CRIM. 26414)

16. People v. Clark, 5 Cal.4th 950, 857 P.2d 1099, 22 Cal.Rptr.2d 689, 62 USLW 2199 (Cal., Aug 30, 1993) (NO. S004791)

17. People v. Wader, 5 Cal.4th 610, 854 P.2d 80, 20 Cal.Rptr.2d 788 (Cal., Jul 08, 1993) (NO. S004792)

18. People v. Mayfield, 5 Cal.4th 142, 852 P.2d 331, 19 Cal.Rptr.2d 836 (Cal., May 27, 1993) (NO. S004568, CRIM. 23349, CRIM. 25196)

19. People v. Cummings, 4 Cal.4th 1233, 850 P.2d 1, 18 Cal.Rptr.2d 796 (Cal., Apr 29, 1993) (NO. S004699, CRIM. 24863)

20. People v. Alcala, 4 Cal.4th 742, 842 P.2d 1192, 15 Cal.Rptr.2d 432 (Cal., Dec 31, 1992) (NO. S004724, CR25693)

23. People v. Payton, 3 Cal.4th 1050, 839 P.2d 1035, 13 Cal.Rptr.2d 526 (Cal., Nov 23, 1992) (NO. S004437, CRIM. 22511, CRIM. 25552)

24. People v. Hill, 3 Cal.4th 959, 839 P.2d 984, 13 Cal.Rptr.2d 475 (Cal., Nov 19, 1992) (NO. S005169, CRIM. CR26427)

29. People v. McPeters, 2 Cal.4th 1148, 832 P.2d 146, 9 Cal.Rptr.2d 834 (Cal., Jul 13, 1992) (NO. S004712, CRIM. 25432)

30. People v. Livaditis, 2 Cal.4th 759, 831 P.2d 297, 9 Cal.Rptr.2d 72 (Cal., Jun 18, 1992) (NO. S004767, CRIM. 26407)

32. People v. Clair, 2 Cal.4th 629, 828 P.2d 705, 7 Cal.Rptr.2d 564 (Cal., May 07, 1992) (NO. S004789, CRIM NO. 26423)

33. People v. Mincey, 2 Cal.4th 408, 827 P.2d 388, 6 Cal.Rptr.2d 822 (Cal., Apr 06, 1992) (NO. S004692, CRIM. 24634)

34. People v. Visciotti, 2 Cal.4th 1, 825 P.2d 388, 5 Cal.Rptr.2d 495 (Cal., Mar 12, 1992) (NO. S004597)

35. People v. Hardy, 2 Cal.4th 86, 825 P.2d 781, 5 Cal.Rptr.2d 796 (Cal., Mar 12, 1992) (NO. S004607, CR 23533)

37. People v. Mitcham, 1 Cal.4th 1027, 824 P.2d 1277, 5 Cal.Rptr.2d 230 (Cal., Feb 24, 1992) (NO. S004636, CRIM. 23833)

38. People v. Pinholster, 1 Cal.4th 865, 824 P.2d 571, 4 Cal.Rptr.2d 765 (Cal., Feb 20, 1992) (NO. S004616, CRIM. 23781)

41. People v. Breaux, 1 Cal.4th 281, 821 P.2d 585, 3 Cal.Rptr.2d 81 (Cal., Dec 30, 1991) (NO. S004760, CRIM. 26206)

42. People v. Price, 1 Cal.4th 324, 821 P.2d 610, 3 Cal.Rptr.2d 106 (Cal., Dec 30, 1991) (NO. CRIM. 25577, S004719)

43. People v. Ashmus, 54 Cal.3d 932, 820 P.2d 214, 2 Cal.Rptr.2d 112 (Cal., Dec 05, 1991) (NO. S004723, CR. 25643)

44. People v. Mickey, 54 Cal.3d 612, 818 P.2d 84, 286 Cal.Rptr. 801 (Cal., Oct 31, 1991) (NO. S004567, CR 23341)

45. People v. Cooper, 53 Cal.3d 771, 809 P.2d 865, 281 Cal.Rptr. 90 (Cal., May 06, 1991) (NO. S004687, CRIM. 24552)

46. People v. Cox, 53 Cal.3d 618, 809 P.2d 351, 280 Cal.Rptr. 692 (Cal., May 02, 1991) (NO. CR. 25425, S004711)

47. People v. Frierson, 53 Cal.3d 730, 808 P.2d 1197, 280 Cal.Rptr. 440 (Cal., May 02, 1991) (NO. CR. 26221, S004761)

48. People v. Wharton, 53 Cal.3d 522, 809 P.2d 290, 280 Cal.Rptr. 631 (Cal., Apr 29, 1991) (NO. S004769)

51. People v. Daniels, 52 Cal.3d 815, 802 P.2d 906, 277 Cal.Rptr. 122 (Cal., Jan 07, 1991) (NO. S004611, CR 23619)

52. People v. Kaurish, 52 Cal.3d 648, 802 P.2d 278, 276 Cal.Rptr. 788 (Cal., Dec 31, 1990) (NO. S004640, CRIM. 23882, CRIM. 25746)

53. People v. Wright, 52 Cal.3d 367, 802 P.2d 221, 276 Cal.Rptr. 731 (Cal., Dec 27, 1990) (NO. S004479, CR. 22843)

54. People v. Gallego, 52 Cal.3d 115, 802 P.2d 169, 276 Cal.Rptr. 679 (Cal., Dec 20, 1990) (NO. S004561)

56. People v. Sanders, 51 Cal.3d 471, 797 P.2d 561, 273 Cal.Rptr. 537 (Cal., Sep 27, 1990) (NO. CR. 22512, S004439)

58. People v. Gordon, 50 Cal.3d 1223, 792 P.2d 251, 270 Cal.Rptr. 451 (Cal., Jun 21, 1990) (NO. S004684, CR. 24551)

59. People v. Mattson, 50 Cal.3d 826, 789 P.2d 983, 268 Cal.Rptr. 802 (Cal., May 03, 1990) (NO. S004705, CR. 25181)

62. People v. Douglas, 50 Cal.3d 468, 788 P.2d 640, 268 Cal.Rptr. 126 (Cal., Apr 02, 1990) (NO. S004666, CR. 24475)

63. People v. Hamilton, 48 Cal.3d 1142, 774 P.2d 730, 259 Cal.Rptr. 701 (Cal., Jun 26, 1989) (NO. S004485, CR. 22911)

64. People v. Coleman, 48 Cal.3d 112, 768 P.2d 32, 255 Cal.Rptr. 813 (Cal., Mar 02, 1989) (NO. S004397, CRIM. 22190)

66. People v. Johnson, 47 Cal.3d 1194, 767 P.2d 1047, 255 Cal.Rptr. 569 (Cal., Feb 23, 1989) (NO. CRIM. 22503, S004425)

67. People v. Walker, 47 Cal.3d 605, 765 P.2d 70, 253 Cal.Rptr. 863 (Cal., Dec 27, 1988) (NO. CRIM. 21707)

68. People v. Adcox, 47 Cal.3d 207, 763 P.2d 906, 253 Cal.Rptr. 55 (Cal., Nov 17, 1988) (NO. CRIM. 23192, S004558)

69. People v. Caro, 46 Cal.3d 1035, 761 P.2d 680, 251 Cal.Rptr. 757 (Cal., Oct 06, 1988) (NO. S004418, CRIM. 22461)

72. People v. Boyde, 46 Cal.3d 212, 758 P.2d 25, 250 Cal.Rptr. 83 (Cal., Aug 11, 1988) (NO. S004447, CRIM. 22584)

73. People v. Williams, 45 Cal.3d 1268, 756 P.2d 221, 248 Cal.Rptr. 834 (Cal., Jul 11, 1988) (NO. S004522, CR 23059)

74. People v. Guzman, 45 Cal.3d 915, 755 P.2d 917, 248 Cal.Rptr. 467 (Cal., Jun 28, 1988) (NO. CRIM. 22418, S002482)

75. People v. Dyer, 45 Cal.3d 26, 753 P.2d 1, 246 Cal.Rptr. 209 (Cal., Apr 28, 1988) (NO. CRIM. 23374)

77. People v. Lucero, 44 Cal.3d 1006, 750 P.2d 1342, 245 Cal.Rptr. 185 (Cal., Mar 28, 1988) (NO. CRIM. 22504)

78. People v. Hendricks, 44 Cal.3d 635, 749 P.2d 836, 244 Cal.Rptr. 181 (Cal., Feb 29, 1988) (NO. CRIM. 22388)

79. People v. Ruiz, 44 Cal.3d 589, 749 P.2d 854, 244 Cal.Rptr. 200 (Cal., Feb 29, 1988) (NO. CRIM. 21370)

80. People v. Hovey, 44 Cal.3d 543, 749 P.2d 776, 244 Cal.Rptr. 121 (Cal., Feb 25, 1988) (NO. CRIM. 22487)

81. People v. Howard, 44 Cal.3d 375, 749 P.2d 279, 243 Cal.Rptr. 842 (Cal., Feb 16, 1988) (NO. CRIM. 22647)

82. People v. Miranda, 44 Cal.3d 57, 744 P.2d 1127, 241 Cal.Rptr. 594 (Cal., Nov 12, 1987) (NO. CRIM. 22787, CRIM. 25350)

83. People v. Ghent, 43 Cal.3d 739, 739 P.2d 1250, 239 Cal.Rptr. 82 (Cal., Aug 13, 1987) (NO. CRIM. 21311)

84. People v. Allen, 42 Cal.3d 1222, 729 P.2d 115, 232 Cal.Rptr. 849 (Cal., Dec 31, 1986) (NO. CRIM. 22879)

SECTION B -- TEXAS -- TOTAL 86 CASES

15. Staley v. State, 887 S.W.2d 885 (Tex.Cr.App., Apr 27, 1994) (NO. 71,274)

16. Coleman v. State, 881 S.W.2d 344 (Tex.Cr.App., Apr 13, 1994) (NO. 71,001)

17. Garcia v. State, 887 S.W.2d 862 (Tex.Cr.App., Apr 13, 1994) (NO. 71,148)

20. Barnes v. State, 876 S.W.2d 316 (Tex.Cr.App., Feb 09, 1994) (NO. 71,291)

21. Riley v. State, 889 S.W.2d 290 (Tex.Cr.App., Nov 10, 1993) (NO. 69,738)

22. Chambers v. State, 866 S.W.2d 9 (Tex.Cr.App., Oct 27, 1993) (NO. 71,345)

24. Wilson v. State, 863 S.W.2d 59 (Tex.Cr.App., Jun 09, 1993) (NO. 70,981)

25. Lookingbill v. State, 855 S.W.2d 66 (Tex.App.-Corpus Christi, Apr 29, 1993) (NO. 13-91-007-CR)

26. Zimmerman v. State, 860 S.W.2d 89 (Tex.Cr.App., Apr 07, 1993) (NO. 71,106)

27. Gunter v. State, 858 S.W.2d 430 (Tex.Cr.App., Mar 10, 1993) (NO. 69,812)

30. Hathorn v. State, 848 S.W.2d 101 (Tex.Cr.App., Oct 28, 1992) (NO. 69,503)

31. Cooks v. State, 844 S.W.2d 697 (Tex.Cr.App., Sep 16, 1992) (NO. 70,772)

32. Kemp v. State, 846 S.W.2d 289 (Tex.Cr.App., Sep 16, 1992) (NO. 70,403)

37. Jones v. State, 843 S.W.2d 487 (Tex.Cr.App., Apr 29, 1992) (NO. 69,894)

38. Fuller v. State, 827 S.W.2d 919 (Tex.Cr.App., Mar 25, 1992) (NO. 70881)

39. Fuller v. State, 829 S.W.2d 191 (Tex.Cr.App., Mar 25, 1992) (NO. 71,046)

42. Moody v. State, 827 S.W.2d 875 (Tex.Cr.App., Jan 15, 1992) (NO. 70883)

43. Vuong v. State, 830 S.W.2d 929 (Tex.Cr.App., Jan 08, 1992) (NO. 70,402)

44. Long v. State, 823 S.W.2d 259 (Tex.Cr.App., Dec 04, 1991) (NO. 69,781)

45. Allridge v. State, 850 S.W.2d 471 (Tex.Cr.App., Nov 13, 1991) (NO. 69,838)

48. Robinson v. State, 851 S.W.2d 216 (Tex.Cr.App., Apr 17, 1991) (NO. 69,568)

49. Nance v. State, 807 S.W.2d 855 (Tex.App.-Corpus Christi, Apr 11, 1991) (NO. 13-90-269-CR)

50. Farris v. State, 819 S.W.2d 490 (Tex.Cr.App., Nov 28, 1990) (NO. 69,659)

52. DeBlanc v. State, 799 S.W.2d 701 (Tex.Cr.App., Oct 24, 1990) (NO. 69,580)

53. Goodwin v. State, 799 S.W.2d 719 (Tex.Cr.App., Oct 24, 1990) (NO. 69,889)

54. Kinnamon v. State, 791 S.W.2d 84 (Tex.Cr.App., Apr 18, 1990) (NO. 69,531)

55. Jacobs v. State, 787 S.W.2d 397 (Tex.Cr.App., Apr 11, 1990) (NO. 69,864)

57. Crane v. State, 786 S.W.2d 338 (Tex.Cr.App., Jan 31, 1990) (NO. 69,977)

58. Barefield v. State, 784 S.W.2d 38 (Tex.Cr.App., Dec 06, 1989) (NO. 69,664)

59. Davis v. State, 782 S.W.2d 211 (Tex.Cr.App., Sep 13, 1989) (NO. 69,467)

60. Harris v. State, 784 S.W.2d 5 (Tex.Cr.App., Sep 13, 1989) (NO. 69,634)

61. Pierce v. State, 777 S.W.2d 399 (Tex.Cr.App., Sep 13, 1989) (NO. 69,777)

62. Foster v. State, 779 S.W.2d 845 (Tex.Cr.App., Jun. 28, 1989) (NO. 69,575)

63. Harris v. State, 790 S.W.2d 568 (Tex.Cr.App., Jun 28, 1989) (NO. 69,366)

64. Johnson v. State, 773 S.W.2d 322 (Tex.Cr.App., Jun 21, 1989) (NO. 69,750)

65. Ransom v. State, 789 S.W.2d 572 (Tex.Cr.App., Jun 14, 1989) (NO. 69,339)

66. Havard v. State, 800 S.W.2d 195 (Tex.Cr.App., Jun 14, 1989) (NO. 69,581)

67. Drinkard v. State, 776 S.W.2d 181 (Tex.Cr.App., Jun 14, 1989) (NO. 69,660)

68. Montoya v. State, 810 S.W.2d 160 (Tex.Cr.App., May 24, 1989) (NO. 69,644)

70. Rogers v. State, 774 S.W.2d 247 (Tex.Cr.App., May 03, 1989) (NO. 69,598)

72. Sosa v. State, 769 S.W.2d 909 (Tex.Cr.App., Feb 15, 1989) (NO. 69,454)

73. McGee v. State, 774 S.W.2d 229 (Tex.Cr.App., Feb 15, 1989) (NO. 69,324)

74. Fearance v. State, 771 S.W.2d 486 (Tex.Cr.App., Dec 07, 1988) (NO. 69,024)

76. Perillo v. State, 758 S.W.2d 567 (Tex.Cr.App., Sep 14, 1988) (NO. 69,435)

78. Holland v. State, 761 S.W.2d 307 (Tex.Cr.App., Jul 13, 1988) (NO. 69,647)

79. Hernandez v. State, 757 S.W.2d 744 (Tex.Cr.App., Jun 29, 1988) (NO. 69,649)

80. Allridge v. State, 762 S.W.2d 146 (Tex.Cr.App., May 11, 1988) (NO. 69,592)

81. Guerra v. State, 771 S.W.2d 453 (Tex.Cr.App., May 04, 1988) (NO. 69,081)

82. Ex parte Williams, 748 S.W.2d 461 (Tex.Cr.App., Apr 20, 1988) (NO. 69,970)

83. Nichols v. State, 754 S.W.2d 185 (Tex.Cr.App., Apr 13, 1988) (NO. 68,981)

86. Smith v. State, 744 S.W.2d 86 (Tex.Cr.App., Nov 12, 1987) (NO. 69,285)

87. Marras v. State, 741 S.W.2d 395 (Tex.Cr.App., Oct 28, 1987) (NO. 69,141)

88. Bennett v. State, 742 S.W.2d 664 (Tex.Cr.App., Oct 21, 1987) (NO. 69,645)

89. Livingston v. State, 739 S.W.2d 311 (Tex.Cr.App., Oct 21, 1987) (NO. 69,477)

90. Knox v. State, 744 S.W.2d 53 (Tex.Cr.App., Sep 30, 1987) (NO. 69,608)

91. Castillo v. State, 739 S.W.2d 280, 81 A.L.R.4th 225 (Tex.Cr.App., Sep 30, 1987) (NO. 69,340)

92. Briddle v. State, 742 S.W.2d 379 (Tex.Cr.App., Sep 23, 1987) (NO. 68,990)

93. Andrews v. State, 744 S.W.2d 40 (Tex.Cr.App., Sep 23, 1987) (NO. 69,078)

94. Miller v. State, 741 S.W.2d 382 (Tex.Cr.App., Sep 16, 1987) (NO. 69,084)

96. Cuevas v. State, 742 S.W.2d 331 (Tex.Cr.App., Jul 01, 1987) (NO. 69,178)

98. Barnard v. State, 730 S.W.2d 703 (Tex.Cr.App., Apr 08, 1987) (NO. 68,861)

100. Ex parte Hughes, 728 S.W.2d 372 (Tex.Cr.App., Mar 18, 1987) (NO. 69,725)

101. Cordova v. State, 733 S.W.2d 175 (Tex.Cr.App., Mar 11, 1987) (NO. 69,096)

102. Montoya v. State, 744 S.W.2d 15 (Tex.Cr.App., Feb 18, 1987) (NO. 69,186)

103. Modden v. State, 721 S.W.2d 859 (Tex.Cr.App., Dec 17, 1986) (NO. 69,442)

104. Mays v. State, 726 S.W.2d 937 (Tex.Cr.App., Dec 03, 1986) (NO. 69,287)

105. Mann v. State, 718 S.W.2d 741, 55 USLW 2298 (Tex.Cr.App., Oct 22, 1986) (NO. 69,008)

106. Bridge v. State, 726 S.W.2d 558 (Tex.Cr.App., Oct 15, 1986) (NO. 69,468)

107. Ex parte Russell, 720 S.W.2d 477 (Tex.Cr.App., Sep 17, 1986) (NO. 69,298)

108. Carter v. State, 717 S.W.2d 60 (Tex.Cr.App., Sep 17, 1986) (NO. 68,982)

109. Clark v. State, 717 S.W.2d 910 (Tex.Cr.App., Sep 17, 1986) (NO. 69,009)

111. Callins v. State, 780 S.W.2d 176 (Tex.Cr.App., Jul 02, 1986) (NO. 69,023)

113. Granviel v. State, 723 S.W.2d 141 (Tex.Cr.App., Jul 02, 1986) (NO. 69,177)

114. Ellis v. State, 726 S.W.2d 39 (Tex.Cr.App., Jul 02, 1986) (NO. 69,210)

115. Moreno v. State, 721 S.W.2d 295 (Tex.Cr.App., May 28, 1986) (NO. 69,268)

117. Sharp v. State, 707 S.W.2d 611 (Tex.Cr.App., Apr 09, 1986) (NO. 69,301)

118. Hogue v. State, 711 S.W.2d 9 (Tex.Cr.App., Mar 19, 1986) (NO. 68,852)

119. Bell v. State, 724 S.W.2d 780 (Tex.Cr.App., Mar 19, 1986) (NO. 68989)

120. Landry v. State, 706 S.W.2d 105 (Tex.Cr.App., Dec 11, 1985) (NO. 69,172)

122. Goodman v. State, 701 S.W.2d 850 (Tex.Cr.App., Oct 02, 1985) (NO. 68,927)

123. McKay v. State, 707 S.W.2d 23 (Tex.Cr.App., Oct 02, 1985) (NO. 69,049)

125. Guzmon v. State, 697 S.W.2d 404 (Tex.Cr.App., Oct 02, 1985) (NO. 69,326)

126. East v. State, 702 S.W.2d 606 (Tex.Cr.App., Jul 24, 1985) (NO. 69,057)

128. Nethery v. State, 692 S.W.2d 686 (Tex.Cr.App., May 22, 1985) (NO. 68,849)

129. Brandley v. State, 691 S.W.2d 699 (Tex.Cr.App., May 08, 1985) (NO. 68850)

130. Bird v. State, 692 S.W.2d 65 (Tex.Cr.App., May 01, 1985) (NO. 61,832)

SECTION C -- FLORIDA -- TOTAL 21 CASES

6. Castro v. State, 644 So.2d 987, 19 Fla. L. Weekly S435 (Fla., Sep 08, 1994) (NO. 81,731)

8. Marquard v. State, 641 So.2d 54, 19 Fla. L. Weekly S314 (Fla., Jun 09, 1994) (NO. 81,341)

9. Hannon v. State, 638 So.2d 39, 19 Fla. L. Weekly S295 (Fla., Jun 02, 1994) (NO. 78,678)

13. Taylor v. State, 638 So.2d 30, 19 Fla. L. Weekly S250 (Fla., May 05, 1994) (NO. 80,121)

14. Peterka v. State, 640 So.2d 59, 19 Fla. L. Weekly S232 (Fla., Apr 21, 1994) (NO. 75,995)

19. Foster v. State, 614 So.2d 455, 17 Fla. L. Weekly S658, 18 Fla. L. Weekly S215 (Fla., Oct 22, 1992) (NO. 76,639)

20. Johnson v. State, 608 So.2d 4, 17 Fla. L. Weekly S603 (Fla., Oct 01, 1992) (NO. 72,694)

25. Trotter v. State, 576 So.2d 691, 16 Fla. L. Weekly 17, 16 Fla. L. Weekly 251 (Fla., Dec 20, 1990) (NO. 70,714)

28. Sanchez-Velasco v. State, 570 So.2d 908, 15 Fla. L. Weekly S538 (Fla., Oct 11, 1990) (NO. 73,143)

31. Randolph v. State, 562 So.2d 331, 15 Fla. L. Weekly S271 (Fla., May 03, 1990) (NO. 74,083)

46. Mitchell v. State, 527 So.2d 179, 13 Fla. L. Weekly 330 (Fla., May 19, 1988) (NO. 70,074)

59. Hansbrough v. State, 509 So.2d 1081, 12 Fla. L. Weekly 305 (Fla., Jun 18, 1987) (NO. 67,463)

62. Lambrix v. State, 494 So.2d 1143, 11 Fla. L. Weekly 503 (Fla., Sep 25, 1986) (NO. 65,203)

65. Maxwell v. Wainwright, 490 So.2d 927, 11 Fla. L. Weekly 219 (Fla., May 15, 1986) (NO. 66,117, 66,129)

66. Funchess v. Wainwright, 486 So.2d 592, 11 Fla. L. Weekly 181 (Fla., Apr 17, 1986) (NO. 68,412)

67. Robinson v. State, 487 So.2d 1040, 11 Fla. L. Weekly 167 (Fla., Apr 10, 1986) (NO. 65,506)

68. Thomas v. Wainwright, 486 So.2d 574, 11 Fla. L. Weekly 154 (Fla., Apr 07, 1986) (NO. 68,526)

75. Cave v. State, 476 So.2d 180, 10 Fla. L. Weekly 481 (Fla., Aug 30, 1985) (NO. 63,172)

77. Valle v. State, 474 So.2d 796, 10 Fla. L. Weekly 381 (Fla., Jul 11, 1985) (NO. 61,176)

79. Dougan v. State, 470 So.2d 697, 10 Fla. L. Weekly 302 (Fla., May 30, 1985) (NO. 65,217)

83. Lara v. State, 464 So.2d 1173, 10 Fla. L. Weekly 79 (Fla., Jan 24, 1985) (NO. 62,691)

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3. Com. v. Jasper, 531 Pa. 1, 610 A.2d 949 (Pa., May 21, 1992) (NO. 45 E.D. 1989)

5. Com. v. Watson, 523 Pa. 51, 565 A.2d 132 (Pa., Oct 19, 1989) (NO. 93 E.D. APPEAL 1984)

6. Com. v. Edwards, 521 Pa. 134, 555 A.2d 818 (Pa., Mar 06, 1989) (NO. 75 E.D. APPEAL 1987)

7. Com. v. Abu-Jamal, 521 Pa. 188, 555 A.2d 846 (Pa., Mar 06, 1989) (NO. 51 E.D. APPEAL 1983)

9. Com. v. Holland, 518 Pa. 405, 543 A.2d 1068 (Pa., May 20, 1988) (NO. 32 E.D. APPEAL 1986)

13. Com. v. Williams, 514 Pa. 62, 522 A.2d 1058 (Pa., Mar 17, 1987) (NO. 43 W.D. 1985)

15. Com. v. Griffin, 511 Pa. 553, 515 A.2d 865 (Pa., Sep 26, 1986) (NO. 130 E.D. 1985)

17. Com. v. Peterkin, 511 Pa. 299, 513 A.2d 373 (Pa., Jul 25, 1986) (NO. 108 E.D. APPEAL 1982)

18. Com. v. Baker, 511 Pa. 1, 511 A.2d 777 (Pa., Jun 23, 1986) (NO. 62 E.D. APPEAL 1983)

20. Com. v. Datesman, 343 Pa.Super. 176, 494 A.2d 413 (Pa.Super., May 31, 1985) (NO. 2639, J. 77013/84)

21. Com. v. Colson, 507 Pa. 440, 490 A.2d 811 (Pa., Apr 04, 1985) (NO. 124 E.D. 1983, J-184-1984)

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9. People v. Williams, 161 Ill.2d 1, 641 N.E.2d 296, 204 Ill.Dec. 72 (Ill., May 19, 1994) (NO. 70576)

10. People v. Childress, 158 Ill.2d 275, 633 N.E.2d 635, 198 Ill.Dec. 794 (Ill., Feb 03, 1994) (NO. 72024)

11. People v. Tenner, 157 Ill.2d 341, 626 N.E.2d 138, 193 Ill.Dec. 105 (Ill., Oct 21, 1993) (NO. 69958)

13. People v. Crosby, 243 Ill.App.3d 1083, 614 N.E.2d 199, 185 Ill.Dec. 65 (Ill.App. 1 Dist., Mar 24, 1993) (NO. 1-89-1479)

18. People v. Williams, 147 Ill.2d 173, 588 N.E.2d 983, 167 Ill.Dec. 853 (Ill., Oct 17, 1991) (NO. 65249)

20. People v. Seuffer, 144 Ill.2d 482, 582 N.E.2d 71, 163 Ill.Dec. 805 (Ill., Sep 19, 1991) (NO. 65657)

22. People v. Edwards, 144 Ill.2d 108, 579 N.E.2d 336, 161 Ill.Dec. 788 (Ill., May 30, 1991) (NO. 67434)

23. People v. Morgan, 142 Ill.2d 410, 568 N.E.2d 755, 154 Ill.Dec. 534 (Ill., Feb 22, 1991) (NO. 67692)

24. People v. Steidl, 142 Ill.2d 204, 568 N.E.2d 837, 154 Ill.Dec. 616 (Ill., Jan 24, 1991) (NO. 65714, 70320)

25. People v. Pitsonbarger, 142 Ill.2d 353, 568 N.E.2d 783, 154 Ill.Dec. 562 (Ill., Nov 30, 1990) (NO. 67879)

28. People v. Brisbon, 129 Ill.2d 200, 544 N.E.2d 297, 135 Ill.Dec. 801 (Ill., May 24, 1989) (NO. 64228)

29. People v. Mahaffey, 128 Ill.2d 388, 539 N.E.2d 1172, 132 Ill.Dec. 366 (Ill., Apr 20, 1989) (NO. 61821, 61822)

31. People v. Gacho, 122 Ill.2d 221, 522 N.E.2d 1146, 119 Ill.Dec. 287 (Ill., Feb 11, 1988) (NO. 61294)

32. People v. Emerson, 122 Ill.2d 411, 522 N.E.2d 1109, 119 Ill.Dec. 250 (Ill., Dec 30, 1987) (NO. 61915)

41. People v. Brisbon, 106 Ill.2d 342, 478 N.E.2d 402, 88 Ill.Dec. 87 (Ill., Apr 19, 1985) (NO. 56560)

42. People v. Del Vecchio, 105 Ill.2d 414, 475 N.E.2d 840, 86 Ill.Dec. 461 (Ill., Feb 22, 1985) (NO. 52800)

43. People v. Collins, 106 Ill.2d 237, 478 N.E.2d 267, 87 Ill.Dec. 910 (Ill., Feb 22, 1985) (NO. 55659)